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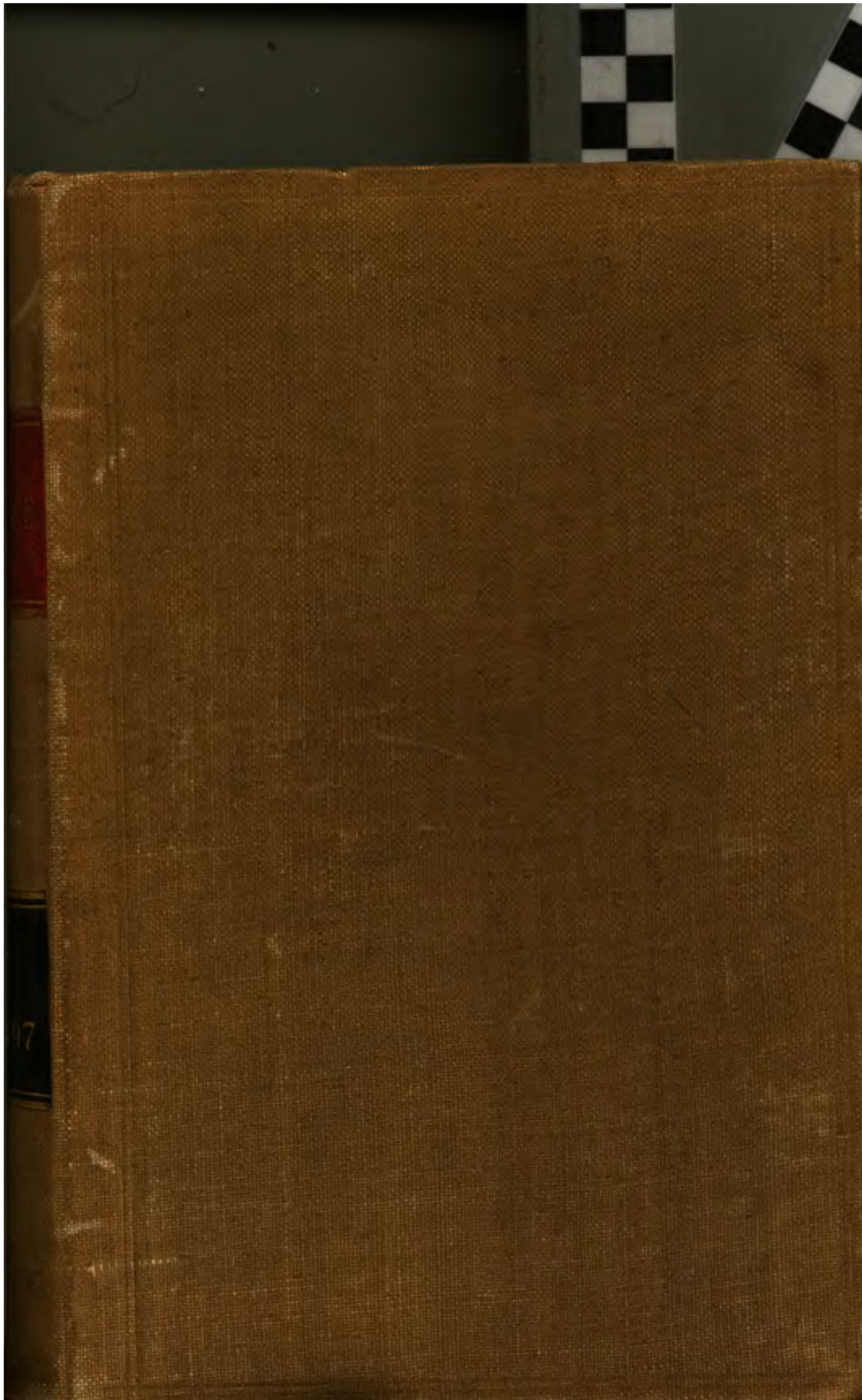
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FEDERAL EQUITY PRACTICE

*A Treatise on the Pleadings Used and Practice Followed in Courts
of the United States in the Exercise of their Equity Jurisdiction*

BY

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EQUITY PLEADING AND PRACTICE IN FEDERAL COURTS.

VOLUME III.

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*Equity of Interpleading.***§ 2235. When Right to Interplead Arises.**

The subject of interpleader is one of the distinct heads of equity, and the treatment of it might with some propriety be relegated to the field of equity jurisprudence, with which it is not within the compass of this work to deal. But the bill of interpleader has some distinctive features of its own; and in accordance with the custom of writers on equity pleading and practice, we shall here proceed briefly to indicate the grounds upon which this bill can be maintained and to describe the nature of the bill and the procedure incident to suits of interpleader.

The right to file a bill of interpleader arises where any person finds himself in the possession of a fund or property belonging to some one else, or where he is charged with the performance of some obligation, or owes some debt to another, and yet the identity of the person to whom the fund or property is properly deliverable or to whom the obligation ought to be performed is doubtful or uncertain, by reason of the fact that there are two or more different claimants each demanding the fund or property or severally insisting on the performance of the obligation to them. In such case, the party having the property or being subject to the obligation can file a bill of interpleader against the several claimants, requiring them to come into court and assert their claims. The conditions under which the equity arises has been otherwise stated as follows: "Where two or more persons, whose titles are connected by reason of one being derived from the other, or of both being derived from a common source, claim the same thing, debt, or duty, by different or separate interests, from a third person, and he, not knowing to which of the claimants he ought of right to render the debt or duty, or to deliver the thing, fears he may be hurt by some of them, he may maintain a suit and obtain against them the remedy of interpleader."¹

§ 2236. Basis of Jurisdiction to Entertain Suit.

The jurisdiction of the court of equity to entertain a bill of interpleader is apparently only one manifestation of its general jurisdiction to prevent a multiplicity of suits. It depends on the fact that distinct claims are made, and it is immaterial whether the claims are of a legal or equitable nature or partly legal and partly equitable.²

¹ 3 Pom. Eq. Jur. 1320; Mitf. Eq. Pl. McWhirter v. Halsted (1885) 24 Fed. (Tyler's ed.) 147; Story, Eq. Pl. 291; 829.

² Barb. Ch. Pr. 117; Louisiana State Lottery Co. v. Clark (1883) 16 Fed. 20; 3 Pom. Eq. Jur. 1321.

The purpose of the bill is not so much to protect the plaintiff against a double liability as it is to protect him against double vexation in respect of one liability. It is of the essence of an interpleading suit that the plaintiff shall be liable to only one of the claimants; and the relief the court affords him is against the vexation of two proceedings in a matter that may be settled in a single suit.³

§ 2237. Illustration of Bill of Interpleader.

A very simple and common illustration of the situation justifying the filing of a bill of interpleader is found in the case where a life insurance policy matures, and the company, while not disputing its liability on the contract, is yet unable to decide to which one, among several claimants, it should pay the proceeds of the policy. In such case the company may file its bill of interpleader against all the claimants, pay the money into court, and ask that the rights of the various parties be determined.⁴ The following case furnishes an illustration of interpleader brought against two defendants, one of whom claimed as assignee in insolvency and the other as an attaching creditor of the common debtor.

McWhirter v. Halsted (1885) 24 Fed. 828: One H made an assignment for the benefit of creditors. Among the choses in action passing to the assignee was a debt owing to the insolvent from a debtor M, living in another state. The assignee sued at law in the federal court to recover this debt. But another creditor had meanwhile attached the same debt in the court of the state where M lived, and claimed the money under the attachment. The debtor M thereupon filed an interpleader against the assignee and the attaching creditor and asked for injunctions against the suits at law. The situation was held to be a proper one for an interpleader and the injunction against the prosecution of the suit at law brought in the federal court by the assignee was granted.⁵

§ 2238. Conditions Essential to Maintenance of Suit.

The following four conditions have been enumerated as being essential to justify a suit of interpleader: (1) The same thing, debt, or duty must be claimed by both or all the parties against whom the relief is demanded; (2) all their adverse titles or claims must be

³ *Crawford v. Fisher* (1842) 1 Hare, 430, 441.

⁴ *Spring v. South Carolina Ins. Co.* (1823) 8 Wheat. 268, 5 L. ed. 614; *Aetna Nat. Bank v. United States Life Ins. Co.* (1885) 25 Fed. 531; *Penn Mut. Life Ins. Co. v. Union Trust Co.* (1897) 83 Fed. 891. For the form of bill in such case, see *Provident Sav. Life etc. Soc. v. Loeb* (1901) 115 Fed. 857.

⁵ But the injunction against the attachment suit in the state court was refused, because of the statute which prohibits the federal courts from enjoining proceedings in state courts. In such a case the state court might properly stay its hand in the attachment proceedings, out of a spirit of comity, upon a proper showing being made to it.

dependent, or be derived from a common source; (3) the person asking the relief—the plaintiff—must not have nor claim any interest in the subject-matter; (4) he must have incurred no independent liability to either of the claimants; that is, he must stand perfectly indifferent between them, in the position merely of a stakeholder.⁶ Of these four conditions something must be severally said.

§ 2239. Adverse Interests of Claimants.

1. Before a bill of interpleader will lie the claimants between or among whom the plaintiff seeks to compel the interpleading must appear to be asserting adverse rights in respect to the same obligation or thing. If the title to *x* is in controversy, and A brings it into court and seeks to force B and C to litigate their respective rights to it, the bill must show that B and C both have a claim or are asserting an interest in this particular thing, *x*. "No case of interpleader can be made, unless the adverse claimants seek to recover the same thing, debt, or duty."⁷

§ 2240. Titles or Interests of Several Claimants Must Be Connected.

2. According to the foregoing analysis, the second requisite of the bill of interpleader is that the adverse titles of the claimants must be connected, or dependent, or one derived from the other, or both derived from a common source; or as is otherwise stated, there must be some privity among the titles or interests of the respective claimants.⁸ If a person who has a legal demand for a sum of money assigns his interest, the debtor may compel the assignor and assignee to interplead. So an auctioneer may maintain a bill of interpleader between a vendor and purchaser who both claim the deposit money at a sale, he being deemed an agent for both parties.⁹

Where the claimants assert their rights under totally different titles having no privity or connection, and where their claims are of different nature, the bill cannot be maintained. Thus a tenant liable to pay rent may file a bill of interpleader where there are several persons claiming title to it in privity of contract, or of tenure, to compel them to ascertain to whom it is properly payable. But if a mere stranger sets up a claim to the rent by a title paramount, and not in privity of contract or tenure, or sets up a claim of a different nature—such as a claim to mesne profits in virtue of his title paramount—

⁶ 3 Pom. Eq. Jur. 1322. Professor Pomeroy's analysis is referred to and judicially approved in *Wells, Fargo & Co. v. Miner* (1885) 25 Fed. 533, 537.

⁷ *Standley v. Roberts* (C. C. A.; 1894) 59 Fed. 836, 8 C. C. A. 305.

⁸ 3 Pom. Eq. Jur. 1324; 2 Barb. Ch. Pr. 119.

⁹ 2 Barb. Ch. Pr. 119.

no bill of interpleader will lie on behalf of the tenant; for the debt or duty is not of the same nature.¹⁰

The exact basis of the rule that prohibits the interpleader from being maintained where the titles of the claimants are unconnected, or not in privity, is uncertain; and there is good reason to believe that the rule is unsound in principle.¹¹ While the federal courts have not formally repudiated the rule, they have shown no disposition to give it a liberal interpretation; and it has been held that a state statute declaring the right of interpleader to exist though the respective titles or claims of the parties have no common origin, may be given effect in the federal court of equity as enlarging equitable rights.¹²

§ 2241. Plaintiff Must Have No Interest in Subject of Suit.

3. It is indispensable in the pure bill of interpleader that the plaintiff himself should be a wholly disinterested stakeholder, and he must personally have no interest in the subject-matter.¹³ A bill does not become a bill of interpleader merely because the plaintiff calls upon the defendants to define their claim, disclose their title, and interplead concerning the same, while at the same time the plaintiff himself asserts an interest in the property.¹⁴ A plaintiff who, instead of admitting title to be in one or the other of the claimants, sets up a trust title in himself for the benefit of one of the claimants and seeks relief against the other, or others, cannot maintain the bill as a bill of interpleader.¹⁵

The interest that will defeat the plaintiff's right to maintain the bill of interpleader must be a substantial interest in the thing or fund that is the subject of controversy. A mere interest in the legal question at issue will not defeat the plaintiff's right to maintain the bill;¹⁶ nor is a mere lien or charge on the thing, or a remote interest in it, enough.

McNamara v. Provident Sav. Life Assur. Soc. (C. C. A.; 1902) 114 Fed. 910, 52 C. C. A. 530: A policy of insurance stipulated for the payment, at its matur-

¹⁰ 2 Barb. Ch. Pr. 119.

¹¹ The rule in question originated in *Crawshay v. Thornton* (1836) 2 Myl. & C. 1. It has been abrogated in England by the Procedure Act, *Attenborough v. London etc. Dock Co.* (1878) L. R. 3 C. P. Div. 450; and the doctrine could hardly be sustained at this time in England even apart from the statute. See observation of Sawyer, J., in *Wells*,

Fargo & Co. v. Miner (1885) 25 Fed. 538; 3 Pom. Eq. Jur. 1324, note.

¹² *Wells, Fargo & Co. v. Miner* (1885) 25 Fed. 533.

¹³ *Killian v. Ebbinghaus* (1884) 110 U. S. 568, 572, 28 L. ed. 246, 248.

¹⁴ *Robinson v. Brast* (1906) 149 Fed. 151, 79 C. C. A. 19.

¹⁵ *Killian v. Ebbinghaus* (1884) 110 U. S. 568, 28 L. ed. 246, 4 Sup. Ct. 232.

¹⁶ 3 Eq. Pom. Jur. 1325.

ity, of ten thousand dollars, less any sum that might be then due upon the policy for unpaid premiums. Upon filing a bill of interpleader the company deducted from the face of the policy the amount of a semi-annual premium which according to the terms of the policy became collectible at the maturity of the policy. The right of the company to retain this premium was questioned by the claimants but without any plausible ground. It was held that the retention of this premium by the company and the consequent controversy over it did not make the company so far interested in the subject-matter as to destroy the character of the suit as a pure bill of interpleader. And the plaintiff was allowed his costs and attorney's fee. If the plaintiff could be said to have any interest in the subject-matter at all, it was too remote to be seriously considered.¹⁷

§ 2242. Plaintiff Must Not Be Independently Liable to Either Claimant.

4. If the person who files the bill of interpleader and seeks to force the different claimants to litigate is under distinct obligation to each or either of them, as for instance, by making separate contracts with them or either of them in respect to the particular subject-matter, the bill of interpleader will not lie, because the claimants have distinct and separate rights against the plaintiff. No case for an interpleader is made where the stakeholder or debtor has made an independent personal agreement with some of the claimants regarding the subject-matter claimed, so that he is under a liability to them beyond that which arises from the title to the subject-matter. If A has effectually bound himself by contract to recognize the right of B in a certain regard, or has estopped himself from denying the title of B, A cannot compel B to litigate his right with C in regard to the same right, title, or interest.

Standley v. Roberts (C. C. A.; 1894) 59 Fed. 836, 8 C. C. A. 305: A lessee who had voluntarily taken two independent leases of the same property from two rival claimants of the title brought the amount due under one of the leases into court and sought to compel the two lessors to interplead, his purpose being thereby to exonerate himself from the obligation to pay the two separate stipulated rents. It was held that the bill would not lie. Here there were two independent debts arising under independent leases, of different dates and different terms, payable to different lessors. The claimants did not claim the same debt from the party who sought to compel them to interplead. The lessee had clearly estopped himself from questioning the right of either.

§ 2243. Bill in Nature of Bill of Interpleader.

Though a party who asserts a substantial interest in the fund or property in controversy cannot file a bill to compel other claimants to interplead concerning the same, it is often allowable for a person so

¹⁷ The suggestion made in court below (1901) 115 Fed. 357; *McNamara v. Provident Sav. etc. Co.* (C. C. A.; 1902) point. *Provident Sav. etc. Soc. v. Loeb* 114 Fed. 910, 52 C. C. A. 530.

situated to file a bill in the nature of a bill of interpleader,¹⁸ in which suit he can have all the substantial benefits of a suit of interpleader, except in respect of his liability to be held for costs, and he may obtain affirmative relief, if he appears to be entitled to it.

1. *Pusey & Jones Co. v. Miller* (1894) 61 Fed. 401: The distinction between the technical bill of interpleader and the bill in the nature of a bill of interpleader was stated thus: "The purpose of a bill of interpleader is to compel the claimants of the same thing, debt, or duty from the party liable therefor, to litigate their respective claims between themselves; the party liable being under no independent liability to any of the claimants, and being merely in the position of a stakeholder, without interest in the matter himself. A bill in the nature of an interpleader lies by a party in interest to ascertain and establish his own rights, when there are other conflicting rights between third persons; as where a mortgagor wishes to redeem a mortgaged estate, and there are conflicting claims between third persons as to their title to the mortgage money, he may bring them before the court to ascertain their rights, and to have a decree for redemption, and to make a secure payment to the party entitled to the money. By the one bill the plaintiff seeks protection from rival claimants and a multiplicity of suits. By the other, he seeks relief, as well as protection."

2. *Butler v. Coleman* (1888) 124 U. S. 721, 31 L. ed. 567, 8 Sup. Ct. 718: This case is an illustration of a bill in the nature of a bill of interpleader filed against the stakeholder instead of by him. A bank receiver, finding certain securities of the bank tied up to indemnify parties who had become sureties on bonds given by the bank to dissolve attachments sued out against it, filed a bill against the attaching creditors and the sureties on the bond. He alleged that the bonds were invalid, that the sureties were therefore not liable to any extent on the bonds, and that consequently he was entitled to the possession of the securities held by them for indemnification. In holding that the suit was a proper one for equitable cognizance, the court said: "The sureties are in a sense stakeholders. They do not claim the securities unless they are liable on the bonds, and the suit, although not brought by them, is in the nature of an interpleader to save them 'from the vexation of two proceedings on a matter which may be settled in a single suit.'"

The bill in the nature of an interpleader cannot be used as a mere device for getting into the court of equity on a purely legal cause of action. Such a bill cannot, for instance, be used as a substitute for an ejectment suit.¹⁹

Formalities Incident to Bill of Interpleader.

§ 2244. Contents of Bill.

The bill of interpleader should set forth in a terse and accurate way the conditions that give rise to the equity of interpleader. To

¹⁸ *Groves v. Sentell* (1894) 153 U. S. 465, 38 L. ed. 785, 14 Sup. Ct. 898; *U. S. 503*, 23 L. ed. 240, 4 Sup. Ct. 232. *Provident Sav. Life Assur. Soc. v. Loeb* (1901) 115 Fed. 357.

¹⁹ *Killian v. Ebbinghaus* (1884) 110

this end, the debt, duty, or other thing for which the defendants are rival claimants should be described, and the general nature of their respective claims or interests should be stated. It should be made to appear that each of the defendants is setting up an exclusive claim to the debt, duty, or other thing; and if either or both of the defendants have made any demand, served any notice, made any threats of suit, or brought any suit, these facts should be set forth.²⁰ The plaintiff should then show that he himself has no interest in and makes no claim to the debt, duty, or other thing, and that he is willing to pay or deliver it to such person as may appear to be lawfully entitled thereto.²¹

The plaintiff must show that he is a mere stakeholder, having no personal interest in the controversy; and he must show that all of the parties defendant have at least a colorable right or claim upon the property, such as will entitle them to interplead. If the plaintiff shows in his bill that any one of the several defendants is clearly entitled to the debt or duty to the exclusion of the others, the suit cannot be maintained.²² Where it appears from the allegations of the bill that the claim of one of the defendants (there being only two) is such that it cannot be sustained on either legal or equitable grounds, there is no cause of interpleader and the bill is demurrable.²³ The bill is equally defective if it admits or shows that both of two claimants are entitled to the thing or duty that is the subject of the suit.²⁴

§ 2245. Offer to Bring Fund into Court.

The plaintiff in a bill of interpleader should offer to bring the fund or property in dispute into court. But a bill is not demurrable for failure to contain such an offer. However, it is necessary that the plaintiff should actually pay the money into court before taking any steps in the cause, if the offer is not properly made in the bill. If the claim is for goods, the plaintiff should offer to surrender the same to the court or its receiver; and it is not sufficient to offer to bring the value of the goods into court.²⁵

²⁰ Gibson, *Suits in Chan.* (2d ed.) 1111.

²¹ Killian v. Ebbinghaus (1884) 110 U. S. 568, 28 L. ed. 246, 4 Sup. Ct. 232.

²² 2 Barb. Ch. Pr. 121.

²³ In *Pusey & Jones Co. v. Miller* (1894) 61 Fed. 401, one of the parties defendant to a bill of interpleader was alleged to claim an interest in the subject-matter of the suit by virtue of a partnership that had existed between

him and the other defendant in the interpleader. But it appeared that the interest and matters in litigation had arisen after that partnership had been dissolved by the death of one of the partners. It was held that the bill failed to show a litigable interest in such party defendant and the bill was dismissed.

²⁴ 2 Barb. Ch. Pr. 121.

²⁵ 2 Barb. Ch. Pr. 122.

§ 2246. Prayer of Bill.

The prayer of the bill is that the defendants may interplead, so that the court may adjudge to whom the money or property belongs; and that the plaintiff may be indemnified. If any suit at law has been brought against the plaintiff, the bill may pray for an injunction to restrain the action until the right is determined. Usually the money must be brought into court before the court will grant such an injunction.²⁶ The bill must not seek affirmative relief against either of the defendants.²⁷

§ 2247. Affidavit of Noncollusion.

Every bill of interpleader should be accompanied by an affidavit of non-collusion, showing that there is no collusion between the plaintiff and any of the other parties. The want of this affidavit is a good ground of demurrer; but where non-collusion is alleged in the bill itself, and the bill is sworn to, no separate affidavit can be considered necessary.²⁸

§ 2248. Proceedings on Bill of Interpleader.

The proceedings in the interpleader suit are conducted in general conformity with the practice in other suits. If the bill is insufficient, the defendants may demur; and if either of the defendants denies the allegations of the bill in an answer, or sets up distinct facts in bar of the suit, the plaintiff must reply and close the proof in the usual manner before the cause can be heard. If the defendants admit the facts stated in the bill, on which the right to file the bill rests, and set up no new facts against the plaintiff, the latter may merely file his replication and set the cause down for a decree to interplead, without waiting until any proof is taken as between the defendants.²⁹

§ 2249. Pleadings of Codefendants—Cross Bill.

In a suit of interpleader the defendant claimants may assert their interests in the property or fund in controversy in their respective answers to the bill of interpleader; and as the title or right of either may be established by the proof, it will be so decreed. A regular cross bill is not essential as between the defendants, unless some special affirmative relief is desired by one as against some one or

²⁶ 2 Barb. Ch. Pr. 122.

²⁸ Gibson, Suits in Chan. (2d ed.)

²⁷ Killian v. Ebbinghaus (1884) 110 1111, 1112.

U. S. 568, 28 L. ed. 246, 4 Sup. Ct. 232.

²⁹ 2 Barb. Ch. Pr. 124.

more of the others.³⁰ However, a cross bill may be filed as between the co-defendants, if it is so desired.

§ 2250. Proceedings on Cross Bill among Defendants.

Where the different claimants to a fund, being defendants in the original bill of interpleader, proceed to interplead with each other by the filing of formal cross bills, they thereupon assume the position, as regards each other, of plaintiff and defendant; and their pleadings are to be treated, construed, and given effect, according to the ordinary rules prevailing in equity. For instance, if one of the parties files a cross bill against his co-defendant, but does not waive the oath, the answer of this co-defendant, being put in under oath, is to be given the usual weight attributed to sworn answers, and its responsive allegations cannot be overcome except by more proof than that supplied by a single witness.³¹

§ 2251. Decree of Interpleader.

The ordinary decree of interpleader is of a preliminary nature, and may be obtained before the cause is ready for final hearing as between the defendants. Upon granting an order of interpleader, the court merely decides that the bill is rightly filed, and dismisses the plaintiff with his costs up to that time. If necessary, the decree will direct an issue or a reference to ascertain the rights of the defendants to the fund or property in controversy. There must be a decree on the bill of interpleader, in order to sustain the further proceedings; but a decree that the bill is properly filed is the only decree that the plaintiff is entitled to, as relief cannot be granted in his favor.³²

§ 2252. Final Decree as between Codefendants.

If the cause is ready for a hearing as between the defendants, as well as between them and the plaintiff, at the time it is brought on for hearing on the interpleader, the court can settle the conflicting claims of the defendants and make a final decree at such hearing.³³

If one defendant and claimant in an interpleader suit establishes his title while another makes default or otherwise fails to establish his title, the court will decree payment of the fund to the former

³⁰ *McNamara v. Provident Sav. etc. Soc.* (C. C. A.; 1902) 114 Fed. 910, 52 C. C. A. 530.

³¹ 2 Barb. Ch. Pr. 125.

³² 2 Barb. Ch. Pr. 124.

³³ *Penn Mut. Life Ins. Co. v. Union Trust Co.* (1897) 83 Fed. 891.

and grant a perpetual injunction against the latter.³⁴ The defendant who permits a bill of interpleader to be taken as confessed against him thereby admits that as to him the bill was properly filed and that he has no just claim upon the fund.³⁵

A defendant and claimant in a bill of interpleader who fails to establish any right in himself to the fund is not entitled to an account from another defendant, who succeeds in establishing his claims, of the amount and origin of these claims.³⁶ A defendant who wholly fails to make out his own right has no cause to complain of the decree in favor of another.³⁷

§ 2253. Costs and Expenses of Suit.

The solicitor's fee and other costs of the disinterested stakeholder who files a technical bill of interpleader may be charged to the fund.³⁸ But it is not so in regard to the solicitor's fee of an interested party who files a bill in the nature of a bill of interpleader. Having an interest in the result of the litigation, the plaintiff must pay his solicitor's fee himself.³⁹

The plaintiff in a bill of interpleader is not entitled to costs where the bill is unnecessary; and it must appear that the bill was properly filed as against both defendants.⁴⁰

§ 2254. When Interest on Fund Not Chargeable to Claimant.

A claimant in an interpleader proceeding will not be charged with interest on the fund during the pendency of the interpleader, though the bond required of him by the order of interpleader covers this element, where his claim seems to have been urged in good faith and he has barely failed to make it good by a preponderance of the proof.⁴¹

³⁴ *McNamara v. Provident Sav. Life Assur. Soc.* (C. C. A.; 1902) 114 Fed. 910, 52 C. C. A. 530. *Greenough* (1881) 105 U. S. 535, 26 L. ed. 1161.

³⁵ 2 Barb. Ch. Pr. 124.

³⁶ *Spring v. South Carolina Ins. Co.* (1823) 8 Wheat. 268, 5 L. ed. 614.

³⁷ *McNamara v. Provident Sav. Life Assur. Soc.* (C. C. A.; 1902) 114 Fed. 910, 52 C. C. A. 530.

³⁸ *Spring v. South Carolina Ins. Co.* (1823) 8 Wheat. 268, 5 L. ed. 614; *Louisiana State Lottery Co. v. Clark* (1883) 16 Fed. 20; *McNamara v. Provident Sav. etc. Soc.* (1902; C. C. A.) 114 Fed. 910, 52 C. C. A. 530.

³⁹ *Groves v. Sentell* (1894) 153 U. S. 408, 38 L. ed. 785, 14 Sup. Ct. 898.

In *McNamara v. Provident Sav. etc. Soc.* (C. C. A.; 1902) 114 Fed. 910, 52 C. C. A. 530, the fee of plaintiff's solicitor was allowed against the fund though in one aspect the bill was considered, or could be considered, as being in the nature of a bill of interpleader and not a pure bill of interpleader.

⁴⁰ 2 Barb. Ch. Pr. 125.

⁴¹ *Buck v. Mason* (C. C. A.; 1905) 135 Fed. 304, 68 C. C. A. 148.

*Interpleading as to Fund Already in Court.***§ 2255. Order Granted without Formal Bill of Interpleader.**

When a court finds itself having the custody of a fund to which there are several adverse claimants, it is proper to enter an order of interpleader, requiring the claimants to litigate their respective rights between or among themselves. The order should require the person most appropriately having the position of actor to file a bill or petition against the others. The pleadings should be in accordance with the rules of equity pleading and the practice to be followed should be in conformity, as nearly as may be, with practice followed in ordinary suits in equity. The order may require the plaintiff to comply with reasonable and proper conditions, as by giving bond for costs and for interest on the fund in case his claim is not established.⁴³

§ 2256. Orders in Nature of Orders of Interpleader.

If, upon entering a money decree, the defendant suggests to the court that he has been served with notices of attachment and assignment and that in consequence it would be unsafe for him to pay the money to the plaintiff of record, the court will allow him to pay it into the registry of the court and bring in the parties who claim the fund by attachment and assignment, in order that they may interplead with each other and the plaintiff of record.⁴³

In any creditor's suit a party defendant who does not dispute the existence of the indebtedness may be allowed, if he desires to do so, to pay the debt into court, whereupon his liability in respect to the debt is discharged and the suit proceeds, as regards the other parties, as a suit of interpleader.⁴⁴

Intervention proceedings in receivership cause and other situations where intervention is allowable are analogous to practice of interpleading.⁴⁵

⁴³ *Buck v. Mason* (C. C. A.; 1905) 135 Fed. 304, 68 C. C. A. 148. ⁴⁴ *Aetna Nat. Bank v. United States Life Ins. Co.* (1885) 25 Fed. 531.

⁴⁵ *Mundy v. Louisville etc. R. Co.* (C. C. A.; 1895) 67 Fed. 633, 14 C. C. Co. (1890) 43 Fed. 223. ⁴⁶ *Farmers' etc. Co. v. Toledo etc. R. Co.* (1890) 43 Fed. 223.

CHAPTER LV.

NE EXEAT.

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General Principles Governing Use of Writ.

§ 2257. Function and Nature of Writ.

The *ne exeat* is a writ that issues to restrain a person from going beyond the confines of the country, or more specially, from going beyond the limits of the jurisdiction of the court, until he has satisfied the plaintiff's claim or has given bond for the satisfaction of the decree of the court.¹ It is a writ in familiar use in equity against

¹ 3 Dan. Ch. Pr. 375.

any one who, "designing to avoid the justice and equity of the court," is about to go beyond the sea.²

The writ is of a high prerogative nature and was originally applicable to purposes of state, but it was afterwards extended so as to be used by the court of equity in civil disputes. Ordinance 89, of Lord Bacon, after recognizing the use of the writ for purposes of state, provides that it may also be issued by the court of chancery "according to the practice of long time used, in case of interlopers in trade, great bankrupts, in whose estate many subjects are interested, or other cases that concern multitudes of the king's subjects." The writ is one of the extraordinary processes of courts of equity, and it is as much a writ of right as any other process used in the administration of justice. The right to issue it is inherent in the court, and it will be granted whenever a proper case is presented.³ The abolition of imprisonment for debt has not deprived the court of the power to issue the writ of *ne exeat*.⁴

Though the writ is primarily a personal writ and is intended to enable the court to retain jurisdiction over the defendant, the removal of property by the defendant may be restrained as an incident to the granting of the writ.⁵

§ 2258. Issuance of *Ne Exeat* from Federal Court.

The authority of the federal courts to issue the writ of *ne exeat* is primarily based upon their inherent jurisdiction as courts of equity; but by statute they have been specially endowed with the power to issue all writs not specifically provided for by statute that may be necessary for the exercise of their respective jurisdictions and agreeable to the usages and principles of law.⁶ The power to issue the writ and the conditions under which it shall be granted are more particularly defined in the following provision.

Revised Statutes, section 717: Writs of *ne exeat* may be granted by any justice of the supreme court, in cases where they might be granted by the supreme court; and by any circuit justice or circuit judge, in cases where they might be granted by the circuit court of which he is judge. But no writ of *ne exeat* shall be granted unless a suit in equity is commenced, and satisfactory proof is made to the court or judge granting the same that the defendant designs quickly to depart from the United States.

§ 2259. Authority of District Judge to Issue Writ.

The first part of this statute is not to be understood as limiting the power of any of the federal courts, when sitting as courts, to issue

² *In re Lipke* (1900) 98 Fed. 971.

⁵ *Patterson v. McLaughlin* (1906) 1

³ 3 Dan. Ch. Pr. 375; 1 Barb. Ch. Pr. Cranch, C. C. 352, 647.

⁶ 716 R. S.

⁴ *Gibson, Suits in Chan.* (2d ed.) 864.

the writ of *ne exeat*. Its purpose apparently is to put beyond cavil the authority of a single justice of a supreme court, or of a circuit justice, or circuit judge, to issue the writ by an order granted at chambers. Accordingly the statute is not to be construed as denying the power of a district court, sitting as a court of equity, to issue the writ. Nor is it to be understood as prohibiting a district judge from issuing the writ when he sits in his capacity as a circuit court. At an early day it was considered that a district judge, sitting as such, had no authority to issue the writ;⁷ and it has even been doubted whether he can properly do so when sitting as judge of a circuit court.⁸ But it is now held that a district judge sitting in the district court as a court of equity has authority to issue the writ;⁹ and he can certainly do so when sitting as judge of a circuit court.

§ 2260. Use of *Ne Exeat* in Bankrupt Proceedings.

The district court exercising jurisdiction in bankruptcy proceedings has authority to issue the writ of *ne exeat*.¹⁰ In these proceedings, the writ is adapted to supplement the statutory warrant of arrest. The warrant of arrest is limited to a detention of the bankrupt for the purpose of examination after the adjudication of bankruptcy, and for his appearance, from time to time, for that purpose, not exceeding in all ten days; also to secure his obedience to all lawful orders made in reference to his examination. The issue of the warrant is further limited to a period of one month after the qualification of the trustee. The limitations upon the use of the warrant often render the use of the writ of *ne exeat* desirable and even necessary in administering bankrupt proceedings.¹¹

§ 2261. Commencement of Suit as Prerequisite of Issuance of Writ.

In the practice of the English chancery the writ would only be granted upon a bill being filed;¹² and section 717 of the Revised Statutes declares that the writ shall not be granted unless a suit in equity is commenced. This requirement is complied with by the filing of a bill and, *a fortiori*, by the additional step of serving the subpoena.¹³ But it is not necessary that the subpoena should be

⁷ *Gernon v. Boecaline* (1807) 2 Wash. the writ with leave to the defendant to move to quash the same.

⁸ *In Loewenstein v. Biernbaum* (1880)

Fed. Cas. No. 8,461a, a district judge sitting as a circuit court queried his right to issue a writ of *ne exeat*; but acting upon the precedent contained in *Union Mut. L. Ins. Co. v. Kellogg* (1878) Fed. Cas. No. 14,373, he granted

⁹ *Lewis v. Shainwald* (1881) 48 Fed. 500.

¹⁰ *In re Cohen* (1905) 136 Fed. 999.

¹¹ *In re Lipke* (1900) 98 Fed. 971.

¹² 3 Dan. Ch. Pr. 387.

¹³ *Loewenstein v. Biernbaum* (1880) Fed. Cas. No. 8,461a.

Eq. Prac. Vol. II.—84.

actually served upon the party before or simultaneously with the service of the *ne exeat*.¹⁴ The commencement of bankruptcy proceedings in a district court is the commencement of a suit in equity within the meaning of the rule allowing the issuance of a *ne exeat*.¹⁵

§ 2262. Against Whom Ne Exeat May Issue.

A *ne exeat* lies only against the debtor, or person legally or equitably liable to the plaintiff. Accordingly, it will not lie against a garnishee, since the garnishee is not personally liable to the creditor.¹⁶ But a *ne exeat* may issue against an executor or administrator, since he becomes personally liable in his representative capacity. He is a debtor to the extent of assets.¹⁷

§ 2263. Writ Available against Citizen of Foreign State.

A doubt has been expressed on the question whether a writ of *ne exeat* can be issued against a citizen or subject of a foreign state. This doubt arises from the consideration that the writ is supposed to have been originally founded upon the right of the sovereign to demand the services of every subject.¹⁸ But whatever may have been the origin of the power to issue the writ, it is certainly now exercised as one of the incidents of equitable jurisdiction and as a means of effectuating the administration of justice. Accordingly there is no good reason why the writ cannot be issued against a foreign citizen or subject of a foreign state.¹⁹ In the English chancery the writ was commonly issued against persons living in Scotland, Ireland, or in the colonies, or in other parts of the British dominions;²⁰ and it could also be obtained by a British subject against a citizen of a foreign state.²¹ If such a person, being subject to suit in England, ventured within the bounds of that country, the writ could issue against him, though he came for a particular purpose only and intended to return immediately.²²

¹⁴ *Georgia Lumber Co. v. Bissell* (1841) 9 Paige 225.

¹⁵ *In re Lipke* (1900) 98 Fed. 970.

¹⁶ *Patterson v. Bowie* (1807) 1 Cranch, C. C. 425, Fed. Cas. No. 10,825.

¹⁷ *Patterson v. McLaughlin* (1806) 1 Cranch, C. C. 352, Fed. Cas. No. 10,828.

¹⁸ *Patterson v. McLaughlin* (1806) 1 Cranch, C. C. 352.

¹⁹ *In Harrison v. Graham* (1801) 110 Fed. 896, Putnam, Circuit Judge, in considering whether the writ should be issued against a subject of the King of

Great Britain, did not express any doubt as to his power to grant the writ against the defendant. But the writ was denied on equitable considerations.

²⁰ 3 Dan. Ch. Pr. 383.

²¹ The writ was granted in the English chancery at the suit of an English subject against a Russian who resided in St. Petersburg but happened to be in England for a temporary purpose. 1 Smith, Ch. Pr. (2d ed.) 578.

²² 3 Dan. Ch. Pr. 383.

§ 2264. Nature of Claim on Which Writ May Issue.

Before a writ of *ne exeat* can be issued, it must appear that the claim or cause of action stated in the bill is of equitable cognizance; or, as is sometimes said, the debt must be an equitable debt.²³ "Wherever a party has a claim against another which he can only enforce in a court of equity, the court will issue the writ."²⁴ If the claim is for a simple debt cognizable at law, and no other ground of equitable jurisdiction exists, the plaintiff will of course be compelled to resort to a court of law.²⁵

§ 2265. Writ Issuable if Equity Court Has Jurisdiction.

A *ne exeat* can be granted by the court of equity in any case over which the court of equity has jurisdiction, although its jurisdiction is concurrent with that of the court of law.²⁶ It is only where the plaintiff has an adequate remedy at law and the jurisdiction of the court of equity is excluded on this ground, that the court of equity will refuse to grant the writ.

The writ of *ne exeat* can be obtained by the vendor in a suit for specific performance to restrain the vendee from going abroad until he has given security for the purchase money. Although in such cases the vendor may have a right to proceed at law for the recovery of his purchase money, yet as equity has concurrent jurisdiction to compel specific performance, the writ may be issued as an incident to the exercise of this jurisdiction.²⁷

The court will also grant the writ upon a bill to recover on a lost bond, though by the practice of the court of law the plaintiff can now declare upon such instrument.²⁸

²³ *Graham v. Stucken* (1857) 4 Blatchf. 50, Fed. Cas. No. 5,677. 4 grant the writ of *ne exeat* upon a legal demand was that the plaintiff could sue the defendant at law and have him arrested in those proceedings and oblige him to give bail. 3 Dan. Ch. Pr. 375.

The only exception in the English chancery to the rule requiring that the demand should be equitable was found in the case of alimony decreed by a spiritual court. Here, as the spiritual court could not arrest a party and take bail, the court of equity lent its assistance by granting a writ of *ne exeat*. 3 Dan. Ch. Pr. 376. 3 The right to arrest and commit persons to jail or require bail in civil causes has been abolished, but the courts of equity have not for this reason extended their jurisdiction so as to permit of the use of the writ in cases cognizable at law.

²⁴ 3 Dan. Ch. Pr. 376.

²⁵ See *McKenzie v. Cowing* (1834) 4 Cranch, C. C. 479, Fed. Cas. No. 8,856. 4 26 3 Dan. Ch. Pr. 378.

One of the reasons formerly assigned for the refusal of the court of equity to 27 3 Dan. Ch. Pr. 378.

28 3 Dan. Ch. Pr. 378.

§ 2266. Claim Must Be Liquidated and Must Be Due.

In order to justify the issuance of the writ of *ne exeat*, the claim or demand sued on must be a debt or liquidated pecuniary claim. It must either be certain or capable of being reduced to certainty; and it must be due.²⁹ An unliquidated claim for damages, not yet reduced to judgment, constitutes no foundation for the writ. As Lord Eldon once observed, "the writ goes only where the debt is sworn to. If damages only are to be recovered at law or in equity, that will not do." Again, said he, the writ is only applied to that which is really a debt, and not to that which may become a debt when a recovery in damages shall have ascertained what is due." Accordingly, it was held by him that a writ of *ne exeat* should not issue upon a demand for damages for loss occasioned by a fraudulent delay on the part of a consignee to sell goods intrusted to him.³⁰

Graham v. Stucken (1857) 4 Blatchf. 50, Fed. Cas. No. 5,677: A claim was held to be insufficient to justify the issuance of the writ of *ne exeat* upon these facts: The plaintiff had, as he alleged, executed bills of sale of two ships to the defendant to secure a usurious loan of money, the transaction being put into the form of a sale to hide the usury. The defendant had taken possession of the ships. The transaction being void for usury under the law of that state, the plaintiff sought to have the bills of sale declared void and the ships returned to him, or in default of such return, a decree for their value. The plaintiff also asked for an accounting of the earnings of the vessels. It was held that this was not a claim for a liquidated money demand such as would justify issuance of the writ.

§ 2267. Prior Decree.

A writ of *ne exeat* may be issued in a suit upon a prior judgment or decree where additional affirmative relief is sought. But it has been refused where the only relief sought was a renewal of the judgment to prevent the bar of the statute of limitations from attaching.³¹

§ 2268. Discretion of Court as to Granting of Writ.

Like all other special writs issued by courts of equity in the exercise of equitable jurisdiction, the writ of *ne exeat* is an equitable writ; and therefore it cannot be granted without some regard to the

²⁹ 3 Dan. Ch. Pr. 382.

³⁰ *Flack v. Holm* (1820) 1 Jac. & W. 404.

Where a clerk embezzled property and money belonging to his employer and, after converting the property into money,

deposited the whole in a bank, a *ne exeat*, it was said, could not be issued (?). *McKenzie v. Cowing* (1834) 4 Cranch, C. C. 479, Fed. Cas. No. 8,856.

³¹ *Shainwald v. Lewis* (1889) 46 Fed. 842.

relative mischiefs that the refusal or allowance of the writ would bring upon the respective parties. It should never be issued unless the cause of action plainly appears to be well founded and the circumstances are such as to call for the remedy. The mere fact that the court has jurisdiction and that the plaintiff may go away is not always enough. The circumstance that the recovery may be nominal only is to be considered as making against the exercise of the discretion of issuing such writ.³²

Harrison v. Graham (1901) 110 Fed. 896: Putnam, Circuit Judge, refused to grant a writ of *ne exeat* under these circumstances: The plaintiff, a citizen of New York state, brought suit in equity in the circuit court of the district of Maine against a subject of Great Britain who lived in Montreal but who was temporarily sojourning in Maine where process was served. It appeared that the plaintiff, if so disposed, could have sued the defendant in the Canadian courts with as much convenience as in the federal court in Maine; and also, that any decree granted in the federal court where suit had been brought would be respected and enforced in Canada. It was held that a denial of the writ would not cause the plaintiff as much inconvenience as the granting of it would probably cause the defendant, and it was accordingly refused.

A writ of *ne exeat* will not be granted where a similar writ has been granted in another suit on the same debt, and the defendant placed under bond not to leave the jurisdiction; especially where the prior writ has been in force for a long period, and the plaintiff has been lacking in diligence in the prosecution of the former suit. The writ of *ne exeat* is in its nature a temporary remedy; and it is not intended to operate as a perpetual restraint upon the defendant's freedom of movement.³³

Formalities Incident to Use of Writ.

§ 2269. Application for Ne Exeat.

The writ of *ne exeat* is obtained in precisely the same way an injunction is obtained, that is, upon a prayer therefor in the bill and application to the court, based on sworn petition or affidavit. It may be applied for at any stage of the suit after the filing of the bill.³⁴

The application is usually made *ex parte*; and no notice of the

³² *Loewenstein v. Biernbaum* (1880) defendant to be harassed with a *ne* Fed. Cas. No. 8,461a. *exeat* where he has already been held in

³³ *Shainwald v. Lewis* (1889) 46 Fed. 839. bail in a court of law on the same demand. 3 Dan. Ch. Pr. 381.

A court of equity will not permit a ³⁴ 1 Barb. Ch. Pr. 648.

application for the writ need be given to the defendant, since the service of notice might have the result of giving the defendant an opportunity to escape from the jurisdiction before the order could become effective.³⁵ The application may be made in open court or it may be made to a supreme court judge, a circuit justice, or a circuit judge at chambers.³⁶

§ 2270. Special Prayer for Writ.

Under the original practice of the equity court, the writ of *ne exeat* could be issued though there was no special prayer therefor in the bill. It was sufficient if the facts alleged in the bill and properly established showed a proper case for the writ. It could be granted under the prayer for general relief; or it could be specially applied for by petition showing the facts entitling the petitioner to such writ. It could be applied for and granted either before or after the decree. Equity rule 21 has modified the practice somewhat as regards the necessity for a special prayer, inasmuch as this rule provides that if a writ of *ne exeat* is required pending the suit it shall be specially asked for. But this provision applies only where the writ is asked for "pending the suit." It has no application where the writ is granted after decree. In such cases the original practice prevails.³⁷ Nor can this rule be considered applicable where the exigency requiring the issuance of the writ arises after the bill is filed and during the progress of the suit. For instance, if a defendant should first threaten to leave the country or begin to make preparations for departure after the filing of the bill and while the suit is pending, an application for the writ could be made without its having been prayed for in the bill, and without any amendment to insert such a prayer. This is in conformity with common sense and in conformity with the practice of the English court of chancery.³⁸

§ 2271. Affidavit in Support of Application.

The application for the writ of *ne exeat* must be supported by a sworn petition or by affidavit, or affidavits, setting forth a sufficient

³⁵ *Loewenstein v. Biernbaum* (1880) Fed. Cas. No. 8,461a.

³⁶ 717 R. S.

³⁷ *Lewis v. Shainwald* (1881) 48 Fed. 492.

³⁸ "It is not necessary to entitle a plaintiff to a writ of *ne exeat* that it should be prayed by the bill, although where the application is intended to be

made immediately on the filing of the bill, it is usual to pray it. It frequently, however, happens that the defendant's intention to go abroad arises, or is first discovered, in the course of the cause, and then there is no doubt that the writ would be issued, though not asked for by the bill." 3 Dan. Ch. Pr. 387.

ground to justify the issuance of the writ. The affidavit should be positive, and if based on information and belief only, is not sufficient.³⁹ The affidavit is usually made by the party himself, but it is not absolutely necessary that it should be made by him. If a party is under legal disability, the affidavit in his behalf may be made by his next friend, guardian, committee, or other person having knowledge of the facts.⁴⁰

The affidavit should be entitled in the suit; and hence it should not be made before the bill is filed.⁴¹ The affidavit on which an application for the writ is based may be amended if it is defective in any of the particulars indicated above.⁴²

§ 2272. Showing of Intention to Leave United States.

The affidavit on which the application is founded must show that the defendant intends going abroad, or that he designs "quickly to depart from the United States." It is not sufficient to show that it is the intention of the defendant to withdraw from the district.⁴³ The affidavit should be positive as to the defendant's intention to go abroad, or declarations or acts evincing such an intention must be shown.⁴⁴ But any proof is sufficient if it shows to the satisfaction of the court or judge granting the writ that the defendant has such an intention.⁴⁵

Where, on an application for a writ of *ne exeat*, it was admitted that the defendant was about to depart from the country and that to this end he was offering his house and furniture for sale, it was held that the showing of an intention quickly to depart was made out, and that the writ might issue notwithstanding the defendant insisted that he expected to return and that the change of residence was only temporary. But the defendant did not state definitely when he intended to return.⁴⁶

§ 2273. Showing as to Nature of Claim Sued on.

An affidavit in a suit on a debt or for an accounting is not sufficient to justify the issuance of a writ of *ne exeat* unless it positively states the existence of a debt for a certain sum or that according to the plaintiff's information and belief a certain balance on account is

³⁹ 3 Dan. Ch. Pr. 389.

⁴⁰ See 3 Dan. Ch. Pr. 389.

⁴¹ 1 Barb. Ch. Pr. 649.

⁴² *Gernon v. Boecaline* (1807) 2 Wash. C. C. 130, Fed. Cas. No. 5367.

⁴³ *Loewenstein v. Biernbaum* (1880)

Fed. Cas. No. 8,461a; *Shainwald v. Lewis* (1880) 46 Fed. 839.

⁴⁴ 3 Dan. Ch. Pr. 390.

⁴⁵ 717 R. S.

⁴⁶ *Graham v. Stucken* (1857) 4

Blatchf. 50, Fed. Cas. No. 5,677.

due. An affidavit is defective where it merely alleges the existence of a just demand against the defendant.⁴⁷

§ 2274. Order Granting or Refusing Writ.

If the court or judge to whom the application is made sees fit to grant the writ, he indorses his order or fiat to that effect on the bill or application, and the writ issues in substantially the same way as a writ of injunction would issue. If he refuses the writ, this fact will be indorsed. In either event the papers are transmitted to the clerk of the court, and if the application has been granted, the writ is issued by him.⁴⁸ Upon granting the writ, the court may make any special order governing the issuance of the writ that may be appropriate under the particular circumstances, as by indicating the sum for which the defendant must be required to give security.

§ 2275. Order Limiting Time of Operation of Writ.

It is usually proper to insert in the order granting a writ of *ne exeat* a provision to the effect that the writ shall be effective until the satisfaction of the decree or until further order of the court. But an order granting a writ of *ne exeat* will not be reversed merely because it fails to place a limit upon the time during which the writ is to be effective. The court has power to control the writ at all times and presumably will dissolve it when its purpose is accomplished or upon a sufficient showing that it ought to be dissolved.⁴⁹

§ 2276. Form of Writ.

The writ is directed to the marshal of the district, and authorizes him to arrest the defendant and compel him to give sufficient bail, or security, that he will not go or attempt to go into parts beyond the seas or beyond the jurisdiction of the court, without leave of the court; and in case the defendant refuses to give such bail or security, the marshal is commanded to commit him and hold him in custody until the further order of the court.⁵⁰

⁴⁷ *Gernon v. Boecaline* (1807) 2 Wash. C. C. 130, Fed. Cas. No. 5,367.

⁴⁸ 3 Dan. Ch. Pr. 393; *Gibson, Suits in Chan.* (2d ed.) 867.

⁴⁹ *Lewis v. Shainwald* (1881) 48 Fed. 500. The order ran as follows: "It is further ordered, adjudged, and decreed that the writ of *ne exeat* of the United States of America issue out of and under

the seal of this court, to restrain the said Harris Lewis from departing out of the jurisdiction of this court." To this should have been added, so it was said, the qualification "until the satisfaction of the decree or the further order of the court."

⁵⁰ 3 Dan. Ch. Pr. 393.

§ 2277. Writ Restrains Departure from Jurisdiction.

Though the writ of *ne exeat* can only be issued upon a showing that the defendant designs quickly to depart from the United States,⁵¹ yet when the court actually comes to issue the writ, it will restrain the defendant from departing from the particular jurisdiction of that court.⁵² This is a seeming inconsistency, but it is probably based on the idea that unless the defendant is restrained from going beyond the jurisdiction of the court, the writ can be given no effect whatever.

§ 2278. Execution of Writ—Giving Security.

The writ of *ne exeat* is executed in all respects like an ordinary *capias*, and bond is taken in the same way. If the marshal accepts security, he should forthwith return the same into court, together with the writ. The defendant may, if arrested, give bond at any time to the marshal and be discharged; or if the court is in session, he may, by leave of the court, give his bond to the clerk, or enter into a recognizance on the minutes.⁵³ Instead of taking bail, the marshal may accept a deposit of the amount indorsed on the writ.⁵⁴

When issued, the writ is indorsed with the required amount of security, which should cover the sum really due, and costs.⁵⁵ Where the writ has been indorsed for a larger sum than is due, the court may subsequently make an order that the security shall be for so much only as is really due, without quashing the writ.⁵⁶

§ 2279. Form of Bond—Performance.

The usual condition of the bond is that the defendant will not depart from the jurisdiction of the court and that he will obey its lawful orders and decrees.⁵⁷

The obligation of the bond is complied with where the defendant in the *ne exeat* remains within the jurisdiction according to the condition of the bond, and his sureties are not liable on the bond. In no

⁵¹ 171 R. S.; *Loewenstein v. Biernbaum* (1880) Fed. Cas. No. 8,461a.

⁵² *Lewis v. Shainwald* (1881) 48 Fed. 500; *In re Cohen* (1905) 136 Fed. 909; *Union Mut. Life Ins. Co. v. Kellogg* (as stated in *Loewenstein v. Biernbaum* (1880) Fed. Cas. No. 8,461a); *Patterson v. McLaughlin* (1906) Fed. Cas. No. 10,828, 1 Cranch, O. C. 352.

⁵³ *Gibson, Suits in Chan.* (2d ed.) 368.

⁵⁴ 3 Dan. Ch. Pr. 395. See 3 Dan. Ch. Pr. 394.

⁵⁵ *In Union Mut. Life Ins. Co. v. Kellogg* (1878) Fed. Cas. No. 14,373, the amount of the bond in the writ of *ne exeat* was fixed at the sum alleged in the bill to be due to the plaintiff.

⁵⁶ 3 Dan. Ch. Pr. 394.

⁵⁷ *In re Lipka* (1900) 98 Fed. 970.

event are the sureties liable for a greater sum than that for which the court finally enters a decree in favor of the plaintiff.⁵⁸

§ 2280. Application for Discharge of Writ.

An application to discharge the writ may be made by the defendant either upon special motion or by petition, of which notice must be given to the plaintiff.⁵⁹ Where the writ has been irregularly granted, the defendant may move to quash or discharge it for the irregularity.⁶⁰

If the application is based upon irregularity, it may be made before answer, and may be supported by affidavit; but in ordinary cases, the defendant must answer before he can apply to discharge the writ, and he cannot be heard upon affidavit unless the writ was issued on a matter arising after the answer had been filed.⁶¹

§ 2281. Grounds of Discharge on Merits.

The court will discharge the writ upon merits whenever it appears that the plaintiff has no case, or no case justifying the issuance of the writ, or that the defendant is not going out of the jurisdiction. It will also discharge the writ upon the defendant's paying into court the sum claimed to be due.⁶² It may be stated generally that whatever would justify the dissolution of an injunction or the discharge of an attachment of property will justify the discharge of a *ne exeat*.⁶³

§ 2282. Proceedings Incident to Discharge of Writ.

When a *ne exeat* is discharged, the court will order that the bond given by the defendant be cancelled; and if the writ was improperly granted, an inquiry before the master may be directed to ascertain the damages sustained by the defendant. A decree for these damages, when ascertained, will be rendered against the plaintiff and against the sureties on the *ne exeat* bond given by him when the writ was issued.⁶⁴

⁵⁸ *Zantzinger v. Weightman* (1824) plaintiff falsely and maliciously procured a *ne exeat* to be issued and caused the penalty of the bond to be fixed at a sum largely in excess of the bail that should have been required, the declaration must allege that the plaintiff in the *ne exeat* proceedings acted without probable cause. *Zantzinger v. Weightman* (1824) 2 Cranch, C. C. 478, Fed. Cas. No. 18,202.

⁵⁹ 3 Dan. Ch. Pr. 396.

⁶⁰ *Gernon v. Boecaline* (1807) 2 Wash. C. C. 130.

⁶¹ 3 Dan. Ch. Pr. 397.

⁶² 3 Dan. Ch. Pr. 397.

⁶³ *Gibson, Suits in Chan.* (2d ed.) 868.

⁶⁴ *Gibson, Suits in Chan.* (2d ed.) 868.

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CHAPTER LVI.

INJUNCTIONS.

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*General Principles.***§ 2283. Injunctive Relief as Ground of Equitable Jurisdiction.**

The subject of injunction, in its broadest extent, comprises a distinct head of equity jurisprudence; and full treatment of it would require a minute consideration of the various grounds upon which the jurisdiction to grant the writ of injunction will be exercised. For the purposes of the present treatise, the discussion will be limited to a consideration of the nature of the writ and of the methods by which it is procured and made effective in the federal courts. It is not desirable or practicable to undertake to define all the situations under which an injunction can be obtained. To do so would require a treatise in itself, and all that can be here attempted is to develop such points of procedure as are common to all situations requiring or justifying the use of the writ. It is sufficient to observe, in regard to the scope of the writ, that its use is commensurate with the jurisdiction of the court. An injunction can be had in any case over which the court may assume jurisdiction, provided only the situation is such that the use of the writ is adapted to the ends of justice in such

case; and it is not necessary that the jurisdiction of the court should arise out of other considerations than those upon which the title to the writ of injunction rests. The claim to injunctive relief is often alone sufficient to support the jurisdiction of the court; for as suggested above, injunction is a substantive head of equity as well as a writ or process of the court.

An assumption of jurisdiction for the purpose of granting an injunction justifies the court in granting complete relief in respect of the subject-matter affected by the injunction.¹

§ 2284. Injunctions and Injunctive Orders.

An injunction is a judicial order, or mandate, granted, made, or issued by a court of equity, requiring a party to do or refrain from doing some specified act. It has been defined as a writ framed according to the circumstances of the case, commanding an act which the court regards as essential to justice, or restraining an act which it considers contrary to equity and good conscience.² In its original and technical sense the term is to be understood as referring to the writ or process by which the court of equity makes its injunctive order or decree effective;³ but in a broader sense it includes all orders or decrees by which a party is commanded to do or to refrain from doing a particular act.

The distinction between the writ of injunction proper and an order or decree in the nature of an injunction is generally disregarded in practice; and injunctive orders, though not enforced by the writ of injunction, are commonly called injunctions.⁴ By the statutes of some of the states, the writ of injunction, considered as a mere process, has been entirely abolished; and in these jurisdictions an injunction has become merely a form of an order or decree, rather than a writ.⁵ But in the federal courts the writ or process of injunction is still used, in conformity with the ancient practice of courts of equity, for the purpose of enjoining or restraining a party in respect to the matters specified in the writ. When used as an interlocutory and conservative process, the injunction is called the "remedial writ of injunction." When the writ of injunction is used to carry into effect a final decree, it is known as the "judicial writ," because it

¹ *Dulaney v. Scudder* (C. C. A.; 1899) 94 Fed. 6, 36 C. C. A. 52. ⁵ *Andrews v. Love* (1891) 46 Kan. 264; *Boyd v. State* (1886) 19 Neb. 128;

² *Parsons v. Marye* (1885) 28 Fed. 121, citing *Jeremy Eq. Jur.* 307. *Methodist Churches v. Barker* (1858) 18 N. Y. 463.

³ 10 *Encyc. of Pl. & Pr.* 876, 877.

⁴ *Ellis v. Commander* (1847) 1 Strobb. Eq. 188.

issues after the decree and is in the nature of a writ of execution of the decree.⁶

§ 2285. Authority of Federal Courts to Issue Writ.

The power of the federal courts of equity to issue the writ of injunction is not only inherent in them, but is amply secured by that provision of the statutes which authorizes the federal courts to issue all writs necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law.⁷ However, one very important limitation upon the power of the federal courts to issue the injunction is found in a statutory provision declaring that the writ of injunction shall not be granted by any court of the United States to stay proceedings in a state court, except in cases where such injunction may be authorized by the bankrupt laws.⁸

The injunction is a due process of law. Consequently the power of a court of equity to grant injunctions is not affected by the constitutional provision relating to due process of law, even though in a particular case the court may disregard the rules of equity and justice in granting the injunction.⁹

§ 2286. Practice Governed by Federal Law.

The practice in the federal courts in regard to the granting of injunctions is governed exclusively by the federal laws and by the accepted equity practice of the federal courts.¹⁰

§ 2287. Injunction Operates against Person.

The writ of injunction is by far the most important and most characteristic of all the processes used by the court of chancery; and it is the principal instrument used by this court in the exercise of its administrative and protective jurisdiction. The process has been well termed "the right arm of the court of chancery."¹¹ It is based upon the power of the court of equity to act *in personam*, or directly upon the individual against whom the writ is directed.

§ 2288. Prohibitory Injunction.

As regards the nature of the act that is required to be done, injunctions are said to be either prohibitory or mandatory. Ordinarily, the

⁶ 1 Barb. Ch. Pr. 608.

⁷ 716 R. S.

⁸ 720 R. S. For cases bearing on the scope and application of this statute, see 4 Fed. Stat. Anno. 509-517.

⁹ *Montana Co. v. St. Louis etc. Co.* (1894) 152 U. S. 170, 38 L. ed. 400.

¹⁰ *Payne v. Kansas etc. R. Co.* (1891) 46 Fed. 546, 551.

¹¹ 1 Barb. Ch. Pr. 615.

injunction is merely preventive or prohibitory, that is, it commands the defendant to refrain from the doing of some injurious act; and it operates to restrain the commission or continuance of an act or series of acts that, if done, would result in injury to the party applying for the injunction. The prohibitory injunction contemplates the situation where a wrong is meditated, and its purpose is to prevent that act and preserve the existing status.¹²

§ 2289. Mandatory Injunction.

An injunction is said to be mandatory when it requires the defendant to do some affirmative act necessary to restore the subject-matter of the controversy to the situation it was in before the doing of the wrongful act complained of.¹³ A mandatory injunction is never granted unless very serious damage will ensue from withholding relief, and each case must of course depend on its own circumstances.¹⁴ Mandatory injunctions not infrequently form part of the final decree in equity causes, as where specific performance is decreed, and an affirmative act is necessary to carry the decree into effect; but the courts are very loath to grant a preliminary mandatory injunction prior to the final decree. They will, however, often accomplish indirectly that which they will not do directly; that is, instead of framing the order so as to command the doing of a positive act, they will so shape it as to prohibit the defendant from doing the reverse of what he is desired to do.¹⁵ Even then the jurisdiction is exercised with caution, and is confined to cases where the court of law would be unable to give adequate redress.¹⁶

§ 2290. Common Injunction.

. As regards the conditions under which injunctions could be procured, a distinction was recognized in the English practice between what was called the common injunction and what was called the special injunction. The common injunction was issued only in suits brought to restrain an action at law or to enjoin the enforcement of a

¹² *Northern Indiana R. Co. v. Michigan Cent. R. Co.* (1853) 15 How. 243, 14 L. ed. 679; *Lacassagne v. Chapuis* (1892) 144 U. S. 124, 36 L. ed. 370; *Cherokee Nation v. Georgia* (1831) 5 Pet. 78, 8 L. ed. 53. ¹³ *Co. v. Clarence R. Co.* (1844) 1 Coll. Ch. Cas. 507; *Westminster Brymbo etc. Co. v. Clayton* (1866) 36 L. J. Ch. N. S. 476. ¹⁴ *Spencer v. London etc. R. Co.* (1836) 8 Sim. 193; *Rankin v. Huskisson* (1830) 4 Sim. 13; *Lane v. Newdigate* (1804) 10 Ves. Jr. 192.

¹⁵ *In re Lennon* (1897) 166 U. S. 556, 41 L. ed. 1113. ¹⁶ *Gibson, Suits in Chan.* (2d ed.)

¹⁴ *Durrell v. Pritchard* (1865) L. R. 1 Ch. 244; *Great North of England etc. R.*

judgment obtained in a court of law; and it could be had only where the defendant in such a bill made default either by failing to appear or by failing to demur, plead, or answer within the time limited by law, after having been duly served with a subpoena. This injunction could also be had where the defendant put in an answer that was afterwards adjudged to be insufficient, an insufficient answer being considered equivalent to no answer at all. The distinguishing feature of the common injunction was that it could be obtained upon a motion as of course; and no notice to the party to be affected by the injunction was necessary.¹⁷

§ 2291. Special Injunction.

All other injunctions than such as were obtained on motion as of course, under the conditions above stated, were called special injunctions. These were not grantable as of course, but only upon the special facts of each case, and upon formal motion, of which the other party was required to be given due notice. The granting of special injunctions was considered to be always a matter of judicial discretion; and good grounds for the order had to be shown in the bill and affidavits, or in the bill and answer.¹⁸

§ 2292. Common and Special Injunctions in Federal Practice.

The distinction between common injunctions and special injunctions is of little importance in the federal courts, though some notice of it appears in equity rule 55. By an early act of Congress it was declared that the writ of injunction should not be granted in any case "without reasonable previous notice to the adverse party, or his attorney, of the time and place of moving for the same."¹⁹ While this statute was in force, no sort of injunction could properly be considered as being grantable as of course; and hence all injunctions granted by the federal courts had to be considered special injunctions.²⁰

When equity rule 55 was promulgated in 1842, a provision in conformity with the practice of the English chancery was incorporated in it, recognizing the common injunction and declaring that such injunction could be issued as of course upon the failure of the defendant (in a suit to enjoin proceedings at law) to plead, answer, or demur. Now so long as the statute above referred to continued in

¹⁷ 3 Dan. Ch. Pr. 276-279.

¹⁸ 3 Dan. Ch. Pr. 297.

¹⁹ Act of March 2, 1793, ch. 22, sec. 5.

²⁰ *Perry v. Parker* (1846) 1 Woodb. &

M. 280; *Lawrence v. Bowman* (1858) 1

McAll. 419.

force, this provision of equity rule 55 could hardly be considered as being effective, because in so far as it authorized the granting of an injunction without notice, it was clearly repugnant to the statute. However, the statutory provision in question was repealed upon the adoption of the Revised Statutes,²¹ and as a consequence the provision in equity rule 55, authorizing the granting of the common injunction upon default, has come to be effective. But the subject of common injunctions is not of any great importance in modern practice.

§ 2293. Restraining Order.

As used in the federal courts, injunctions may be conveniently divided into three classes: (1) Restraining orders, (2) preliminary injunctions, (3) final injunctions. The restraining order is a temporary, or interlocutory, order issued upon an *ex parte* order of the court, or judge. Its sole purpose is to restrain the person against whom it is granted from the doing of some particular act during the time an application for a preliminary injunction is pending. Restraining orders are issued under the authority of section 718 of the Revised Statutes, and notice to the party against whom the restraining order is obtained is unnecessary. The granting of a restraining order does not contemplate the continuance of such order in force throughout the whole litigation, but only until the regular motion for a preliminary injunction can be heard on due notice. It may be noted that the term "restraining order" is sometimes incorrectly used where the ordinary preliminary injunction is meant.²²

§ 2294. Preliminary Injunction.

The preliminary injunction is an interlocutory order, or writ issued in pursuance of such interlocutory order, granted at any time during litigation and before the final hearing and decree on the merits.²³ In the federal practice, preliminary special injunctions are granted only upon motion, and after due notice to the party to be affected.²⁴ The preliminary injunction is frequently spoken of as a provisional injunction; it is also called interlocutory injunction.

²¹ The provision in question was repealed by the failure of the revisers to incorporate it in the Revised Statutes and by the adoption of section 716 R. S., which is repugnant to the former provision. *Yuengling v. Johnson* (1877) 1 Hughes 610.

Eq. Prac. Vol. II.—85,

²² See, e. g., *Indianapolis Gas Co. v. Indianapolis* (1897) 82 Fed. 245; *Charles v. City of Marion* (1899) 98 Fed. 166.

²³ *Adams v. Crittenden* (1881) 17 Fed. 42.

²⁴ Though the original statutory provision prohibiting the issuance of in-

§ 2295. Final Injunction.

The final injunction is granted only at a final hearing on the merits. It forms a part of the final decree in all cases where an injunction has been prayed for in a bill and the case is such as to justify the granting of it. The final injunction is usually perpetual, and it acts as a continual inhibition on the party against whom it is granted, restraining him from the assertion of some assumed right or perpetually enjoining him from the commission of an act that would be contrary to equity and conscience.

§ 2296. Statute and Rule Governing Issuance of Injunctions.

The issuance of the writ of injunction as a provisional remedy in the federal courts is governed by the following statute and rule.

1. Revised Statutes, section 719: Writs of injunction may be granted by any justice of the supreme court in cases where they might be granted by the supreme court; and by any judge of a circuit court in cases where they might be granted by such court. But no justice of the supreme court shall hear or allow any application for an injunction or restraining order in any cause pending in the circuit to which he is allotted, elsewhere than within such circuit, or at such place outside of the same as the parties may stipulate in writing, except when it cannot be heard by the circuit judge of the circuit or the district judge of the district. And an injunction shall not be issued by a district judge, as one of the judges of a circuit court, in any case where a party has had a reasonable time to apply to the circuit court for the writ; nor shall any injunction so issued by a district judge continue longer than to the circuit court next ensuing, unless so ordered by the circuit court.

2. Equity rule 55: Whenever an injunction is asked for by the bill to stay proceedings at law, if the defendant do not enter his appearance and plead, demur, or answer to the same within the time prescribed therefor by these rules, the plaintiff shall be entitled as of course, upon motion, without notice, to such injunction. But special injunctions shall be grantable only upon due notice to the other party, by the court in term, or by a judge thereof in vacation, after a hearing, which may be *ex parte* if the adverse party does not appear at the time and place ordered. In every case where an injunction—either the common injunction or a special injunction—is awarded in vacation, it shall, unless previously dissolved by the judge granting the same, continue until the next term of court, or until it is dissolved by some other order of the court.

junctions otherwise than upon due notice has been repealed, equity rule 55 still requires that due notice shall be given to the other party before the granting of any special injunction. But the hearing upon an application for an injunction can be *ex parte*, if the adverse party does not appear at the time and place noticed for the hearing of the application. Equity Rule 55.

§ 2297. Injunction Granted by Supreme Court Justice.

Originally a justice of the supreme court could grant an injunction at any place in or out of the circuit in which the suit was instituted; but by the statute above quoted, his authority to grant an injunction elsewhere than within the circuit is restricted to cases where the parties stipulate for a hearing before him out of the circuit, or where the parties cannot present their application to the circuit or district judge. When the circuit and district judges are both absent, the supreme court justice may hear the application wheresoever he may be.²⁵

§ 2298. Injunction Granted by District Judge.

The limitation contained in the statute on the power of the district judge to issue an injunction applies only to the case where the district judge acts in vacation and in his capacity as district judge. A district judge, acting as a judge of the circuit court, can issue the writ as fully and freely as any circuit judge or circuit justice, acting in the same capacity, could issue it.²⁶ A writ issued by the circuit court held by a district judge is issued by the court and not by the district judge.²⁷

The action of a district judge, while holding the circuit court, in refusing to dissolve an injunction previously granted by himself is as effectual to continue the injunction in force as if the order had been made by the full circuit bench.²⁸

§ 2299. Injunction Granted by Circuit Judge.

Though a circuit judge has ample authority to grant an injunction in vacation, such an injunction will not be granted when the party has an opportunity to apply in a reasonable time to the circuit court sitting in term time; and the fact that the court when it convenes will be presided over by a district judge is immaterial.²⁹

²⁵ *Searles v. Jacksonville etc. R. Co.* (1873) 2 Woods 621, Fed. Cas. No. 561, 6 L. ed. 729; *Industrial etc. Guaranty Co. v. Louisville etc. Canal Co.* (1873) 4 Dill. 601, Fed. Cas. No. A.; 1893) 58 Fed. 732, 7 C. C. A. 471.
²⁶ *Parker v. Judges* (1827) 12 Wheat. 15,633.

²⁷ *Gray v. Chicago etc. R. Co.* (1864) Folsom (1880) 3 Fed. 509.
²⁸ *Goodyear Dental Vulcanite Co. v. Folsom* (1880) 3 Fed. 509.

²⁹ *Goodyear Dental Vulcanite Co. v. Folsom* (1880) 3 Fed. 509.

§ 2300. Duration of Injunction Granted in Vacation.

The judges of the supreme court have the power to grant interlocutory injunctions during vacation that will not expire with the vacation.³⁰ Injunctions granted in vacation by district judges do not continue longer than to the circuit court convening next after the granting of the injunction. This is settled by an express provision of the statute above quoted. Upon the question whether the efficacy of an injunction granted by a district judge ceases immediately upon the convening of the court and the commencement of the new term or whether it continues in force during the term, the statute is not clear. It is commonly understood, however, as referring to the commencement of the term.³¹ It thus becomes important for a party who has obtained an injunction from a district judge in vacation to apply at once upon the convening of the court for an order continuing the injunction in force; and undoubtedly the statute must be construed to give him a reasonable time for the making of such a motion.

In limiting the duration of the injunction granted in vacation time to the commencement of the ensuing term, the statute refers only to injunctions granted by district judges. So far as this statute is concerned, the circuit judges have the power to issue injunctions that will run on beyond the opening of the ensuing term and continue in force until they are dissolved by the court. Equity rule 55, however, contains a provision that seems to have been generally, though no doubt erroneously, understood as limiting injunctions granted by circuit judges in vacation in the same way that the statute limits injunctions granted by district judges. This rule says that in every case where an injunction is awarded in vacation, it shall, unless previously dissolved by the judge granting the same, continue until the next term of the court, or until it is dissolved by some other order of the court. It will be noted that the point of view indicated in this provision is entirely different from that indicated in the similar provision in the statute; for, whereas the statute contemplates putting a limit on the duration of injunctions granted by district judges, so that they shall not continue too long, the rule, on the other hand, contemplates that the duration of the injunction shall not be too short. The object of the rule is to make it certain that injunctions granted in vacation shall continue in force at least until the opening of the ensuing term. The

³⁰ *Gray v. Chicago etc. R. Co.* (1864) 13 C. C. A.; 1895) 65 Fed. 645, Woolw. 63, Fed. Cas. No. 5,713. 13 C. C. A. 73; *U. S. v. Weber* (1902)

³¹ *Gray v. Chicago etc. R. Co.* (1864) 114 Fed. 951.

1 Woolw. 66; *Dreutzer v. Frankfort*

rule does not inhibit the judge granting the injunction from giving it a longer duration than to the next term; but on the contrary, the rule plainly implies that the court may, if it sees fit, make an injunctive order that shall continue in force after the opening of the term and until it is dissolved. Where the injunction is so framed and ordered by a circuit judge, it will undoubtedly continue in force until dissolved, notwithstanding the arrival of the ensuing term.³² The terms of the rule are broad enough to apply to injunctions granted by both district and circuit judges; but a district judge cannot make an injunction that will be effective beyond the ensuing term, for on this point the rule is controlled by the statute.

§ 2301. Effect of Injunction against Judgment at Law.

An injunction against a judgment at law does not operate as a supersedeas of the judgment. The plaintiff in the judgment at law may therefore proceed to execution, and the validity of the process is not thereby endangered. But undoubtedly the court of law would upon a proper showing stay the proceedings; and the plaintiff who would proceed to disobey the injunction would of course incur the penalty of contempt in the court of equity.³³

Preliminary Steps in Procuring Injunction.

§ 2302. Injunction Grantable Only upon Suit Brought.

The first step in the procurement of an injunction consists in the filing of a bill; and there is said to be no instance of this writ having been granted in modern times in the English chancery without the institution of a suit.³⁴ Certainly it is always necessary that there should be a suit presently instituted or one already pending such as to justify the granting of the writ as an incident to that suit.

§ 2303. Prayer for Issuance of Writ.

The second requisite is that the bill upon which the injunction is sought should be specifically framed as an injunction bill and should

³² But as suggested in the text the rule in question has sometimes been understood as limiting the power of the circuit judge in the same way that the statute limits the power of a district judge. *Gray v. Chicago, Iowa etc. R. Co.* (1864) 1 Woolw. 67, 68.

³³ *Story, J. in Boyle v. Zacharie* (1832) 6 Pet. 658, 8 L. ed. 538.

³⁴ 1 Smith, Ch. Pr. (2d ed.) 586.

The granting of injunctions without a bill was one of the articles of impeachment against Cardinal Wolsey. *Fletcher, Eq. & Pr.* 499.

contain a special prayer asking for the injunction.³⁵ The prayer for general relief is not sufficient to authorize the granting of the writ.³⁶ This rule, however, applies more specially to the provisional writ of injunction, or injunction *pendente lite*. Upon finally adjudicating a cause and upon granting relief appropriate to the case made in the bill and established by the proof, the court will frequently interpose by injunction, although it is not prayed for in the bill.³⁷

According to the practice of the English chancery, it was required that the prayer for relief should be repeated in the prayer for process;³⁸ but the necessity for this recital in the prayer for process has been dispensed with by equity rule 23, and it is sufficient that the prayer be contained in the prayer for relief.

§ 2304. Exceptions to Rule Requiring Special Prayer.

The rule prohibiting the granting of the provisional writ of injunction, or injunction *pendente lite*, where it is not specially prayed for, is subject to some exceptions. For instance, where a court has acquired jurisdiction over the parties and over the subject-matter, it may always interfere to protect the subject-matter of the suit and for the purpose of controlling the proceedings before it, although no injunction has been prayed for. When thus used the writ is not so much an instrument of relief to one or the other party, as it is a means by which the court controls the proceedings in the cause before it. Instances of this use of the injunction frequently occur in receivership proceedings and in cases of foreclosure. So, where the court has undertaken the administration of an estate, it may restrain a creditor who is not a party to the suit from proceeding against the estate for his own individual debt.³⁹

§ 2305. Allegations of Injunction Bill.

The allegations of the bill seeking an injunction should be sufficiently full and precise to make out a case for the issuance of such

³⁵ Equity Rule 21.

³⁶ 3 Dan. Ch. Pr. 301; 1 Dan. Ch. Pr. 502.

³⁷ 1 Dan. Ch. Pr. 503; *Gaines v. Hale* (1870) 26 Ark. 199.

³⁸ *Wood v. Beadell* (1829) 3 Sim. 273; *Walker v. Devereaux* (1833) 4 Paige 229.

³⁹ By an anomalous practice that grew up in the English court of chancery in the latter part of the eighteenth cen-

tury, it became permissible, in suits for the administration of an estate, for a party to such suit (as, for instance, an executor, administrator, heir, legatee, or creditor) to obtain in that suit and upon mere motion, an injunction to restrain a creditor of the estate from prosecuting an action at law. This practice dispensed with the filing of an independent bill; but it was only allowed in cases where there was a pending suit in

extraordinary process. Such a bill is not only a pleading but contains matter to be used as an affidavit upon the application for the injunction. As a pleading, the bill should show a clear right to relief against the wrong complained of; and as an affidavit, it should set forth in detail the facts and circumstances of the case in such way as to make clear the nature of the wrong and to show that irreparable injury will be done if the writ is not granted. Being a harsh remedy, an injunction will not be granted, except upon a clear *prima facie* case, and upon positive averments of the equities upon which the application is based.⁴⁰ The bill must show that the plaintiff has no adequate remedy at law.⁴¹

§ 2306. Allegations Must Be Specific.

The bill must set forth facts; and mere allegations of conclusions will not avail.⁴² It is not sufficient to allege the bare fact, for instance, that the acts complained of are invalid, that the defendant has been or is guilty of an abuse of trust, that a mistake has been committed, that the defendant has erected and is maintaining a nuisance, or has committed and is committing waste; but in each particular instance, such facts must be alleged as will enable the court to determine that the grounds relied upon for an injunction actually exist.⁴³

§ 2307. Statements Made on Information and Belief.

Allegations made upon information and belief are, as a rule, insufficient. In the ordinary injunction bill, which is sworn to by the plaintiff, it is necessary to state the facts on which the application is based in positive and direct terms, and as being within the plaintiff's personal knowledge. But this rule is not always insisted upon, and is subject to exceptions. Thus where discovery is sought, and the facts appear to lie in the defendant's knowledge, a statement that the plaintiff is informed and believes that a fact is true and that he therefore charges the fact to be true, is enough.⁴⁴ And in any case where the matters do not lie within the personal knowledge of the plaintiff,

which the creditor could come in and Cranch C. C. 394; Woodman v. Kilprove his claim. 3 Dan. Ch. Pr. 298, bourn Mfg. Co. (1867) 1 Biss. 546; 299. Wilkinson v. Dobbie (1874) 12 Blatchf.

⁴⁰ Gibson, Suits in Chan. (2d ed.) 298; St. Louis Type Foundry v. Carter etc Printing Co. (1887) 31 Fed. 524. 838.

⁴¹ Francis v. Flinn (1886) 118 U. S. 385, 30 L. ed. 165. ⁴² 10 Encyc. of Pl. and Pr. p. 927.

⁴³ Wilson v. Bastable (1806) 1 Paige 157. ⁴⁴ Campbell v. Morrison (1838) 7

he may allege those matters upon information and belief;⁴⁵ but the statements of the bill as to such matters should be corroborated as far as possible by the affidavits of persons having personal knowledge.⁴⁶

§ 2308. No Injunction on Defective Bill.

An injunction will not be granted in any case where the bill is so far defective as to be demurrable, and the defect is pointed out;⁴⁷ and sometimes the fact that a bill is general and lacking in specific averments will be taken as supplying a good reason for refusing an injunction, though the bill is not actually demurrable for want of equity.⁴⁸

Any demurrable defect in the allegations of an injunction bill may be cured by amendment;⁴⁹ and if the bill should fail to contain a prayer for an injunction, this defect may be amended at the time of the application for the injunction, though the absence of the prayer does not make the bill demurrable as a bill for relief.⁵⁰

§ 2309. Verification of Bill.

The bill should be duly verified by the oath of the plaintiff, or of his agent, or attorney, having knowledge of the facts. The purpose of the oath is to entitle the plaintiff to use the bill as a sort of affidavit, upon the application for the writ of injunction. The oath is not necessary in so far as the bill merely seeks relief. A bill seeking injunctive relief is therefore never demurrable for lack of verification; and a permanent injunction can be granted as final relief regardless of whether the bill is verified or not.⁵¹

On an application for a temporary injunction, the fact that the bill is unverified has been held to be of no consequence where the defendant merely demurs to the bill. The demurrer admits the allegations of the bill to be true, and therefore verification is unnecessary.⁵²

Application for Temporary Restraining Order.

§ 2310. Filing Bill—Application for Restraining Order.

A restraining order cannot be granted, or at least cannot be made effective, until the bill has been filed. This does not mean that the

⁴⁵ 10 Encyc. of Pl. and Pr. p. 930.

⁵⁰ Wood v. Beadell (1829) 3 Sim.

⁴⁶ Gibson, Suits in Chan. (2d ed.) 273.

⁵¹ Woodworth v. Edwards (1847) 3

828. ⁴⁷ Brooks v. O'Hara (1881) 8 Fed. Woodb. & M. 120; Hughes v. Railroad

529. Co. (1883) 18 Fed. 106; Black v. Allen

⁴⁸ United States v. Jellico etc. Co. Co. (1890) 42 Fed. 618, 9 L.R.A. 433.

(1890) 43 Fed. 898. ⁵² Cobb v. Clough (1897) 83 Fed.

⁴⁹ Meyers v. Shields (1894) 61 Fed. 604.

bill must be filed in the clerk's office before the application is laid before the court, or judge. In fact a very common practice is first to present the bill to the judge and get his fiat for a restraining order. The judge, upon granting the fiat for the restraining order, merely indorses an order for the writ to issue upon the bill being filed, and upon the execution of such bond as he sees fit to require. The bill is then taken to the clerk's office, and a subpoena is issued at the same time as the restraining order, and both are served upon the defendant together.⁵³ At the same time the defendant should be served with notice of the motion for a preliminary injunction, if such notice has not been already otherwise served.⁵⁴ The temporary restraining order may be served at the same time as notice of the application for the appointment of a receiver.⁵⁵

Universal Savings & Trust Co. v. Stoneburner (C. C. A.; 1902) 113 Fed. 251, 51 C. C. A. 208: A bill having been prepared was submitted to the judge of the circuit court at chambers with a request for a restraining order. Upon due consideration of the bill the court granted the order. The bill was not actually filed with the clerk until two days later. A subpoena was then issued. The restraining order was issued at the same time as the subpoena and both were served on the defendant together. It was held that the restraining order was not rendered invalid by the fact that it was given out by the judge before the bill was filed.⁵⁶

§ 2311. Bond to Indemnify Defendant.

Upon granting a fiat for a restraining order the court may, in its discretion, require the plaintiff to execute a bond with good security to indemnify the defendant for any loss he may sustain by reason of the wrongful suing out of the restraining order.⁵⁷

⁵³ The restraining order of the federal courts is the same in substance as the preliminary *ex parte* injunction sometimes granted in the English chancery at the institution of the suit. In the practice of that court it was customary to serve the injunction at the same time as the subpoena. 3 Dan. Ch. Pr. 353

⁵⁴ *Yuengling v. Johnson* (1877) 1 Hughes 607, Fed. Cas. No. 18,195; *Joseph Dry Goods Co. v. Hecht* (C. C. A.; 1903) 57 C. C. A. 64, 120 Fed. 760.

⁵⁵ *North American Land etc. Co. v. Watkins* (C. C. A.; 1901) 48 C. C. A. 254, 109 Fed. 101; *Cabaniss v. Reco Min. Co.* (C. C. A.; 1902) 54 C. C. A. 190, 116 Fed. 318.

⁵⁶ In Rule No. 29 of the Circuit Court

for the Northern District of California, there is an explicit provision to the effect that no application for a restraining order or preliminary injunction shall be entertained by the court or judge until after a bill has been filed in the clerk's office and a subpoena issued thereon. This rule of course supplies a rule for the guidance of the judges; but clearly, if a judge saw fit not to follow the rule in any case, the restraining order would be entirely valid, if issued and made effective upon or after the filing of the bill, though previously entertained.

⁵⁷ *Consolidated Fruit Jar Co. v. Whitney* (1874) Fed. Cas. No. 3,132.

§ 2312. Considerations Affecting Exercise of Judicial Discretion.

The object of a restraining order is to preserve the *status quo* while the application for a preliminary injunction is pending.⁵⁸ It should only be granted where there is shown to be danger of irreparable injury from the delay incident to the giving of the notice of the motion for the injunction.⁵⁹ The granting of a restraining order, in anticipation of the hearing on a motion for an injunction, is a serious exercise of power; and it should not be granted except upon a moral certainty of irreparable injury if it be refused. Nor should the writ be continued in force when it is made to appear that such a result is not imminent.⁶⁰ The restraining order should never be granted where, upon the facts shown in the bill, no pressing necessity appears to exist;⁶¹ and where the filing of the bill itself creates a *lis pendens* in favor of the plaintiff that will fully protect his rights, a restraining order will not be allowed.⁶²

The circumstance that a restraining order will do no harm to the party against whom it is aimed is not sufficient to justify granting it. There must affirmatively appear to be some necessity for granting it and that it would do the other party some good. Otherwise the issuance of it would be vain.⁶³

§ 2313. Validity of Order as Affected by Jurisdiction of Court.

A restraining order issued in a cause over which the court has no sort of jurisdiction whatever is void; but if the court has essential jurisdiction, its injunctive order, though irregular, or based upon a demurrable bill, is valid; and contempt proceedings will lie against a defendant who violates it.⁶⁴

§ 2314. Limiting Duration of Restraining Order.

The preliminary restraining order should contain a statement limiting its duration. For instance, it may be expressed that the order is to remain in force until further order of the court, or until the court hears and decides upon the motion for the preliminary

⁵⁸ *Joseph Dry Goods Co. v. Hecht* (C. C. A.; 1903) 57 C. C. A. 64, 120 Fed. 760.

⁵⁹ *Industrial etc. Co. v. Electrical Supply Co.* (C. C. A.; 1893) 7 C. C. A. 471, 58 Fed. 737; *Wabash R. Co. v. Hannahan* (1903) 121 Fed. 563.

⁶⁰ *Ryan v. Seaboard etc. Co.* (1898) 89 Fed. 385, 387.

⁶¹ *Worth Mfg. Co. v. Bingham* (C. C. A.; 1902) 116 Fed. 785, 54 C. C. A. 119.

⁶² *Barstow v. Becket* (1899) 110 Fed. 826.

⁶³ *Teller v. United States* (C. C. A.; 1901) 113 Fed. 463, 51 C. C. A. 297.

⁶⁴ *United States v. Agler* (1894) 62 Fed. 824. Compare, post, §§ 2483, 2489.

injunction, or upon the motion to set aside the restraining order, as the case may be.⁶⁵ Where the application for the preliminary injunction takes the form of a rule to show cause why a preliminary injunction should not be granted, the restraining order will be made operative until the hearing and determination of such rule to show cause.⁶⁶

§ 2315. Discharge of Restraining Order.

A defendant against whom a restraining order has been granted may apply at once to dissolve the restraining order; and it is not necessary that he should first answer before making his motion to dissolve.⁶⁷ This rule is applied even though the bill is one for discovery.⁶⁸ The motion to dissolve a restraining order is frequently heard at the same time as the motion for an injunction *pendente lite*.⁶⁹

A restraining order should be dissolved where it appears to have been improvidently granted,⁷⁰ or where it appears that the plaintiff has no such claim to the issuance of the writ as appeals to the conscience of the chancellor.⁷¹

An order vacating a restraining order becomes effective when and as the court makes it effective. In one case the court in its opinion declared that the stay in that case should be vacated and that the mere filing of the opinion should be sufficient evidence of such vacation.⁷²

Application for Preliminary Injunction.

§ 2316. Motion for Interlocutory Injunction.

The regular preliminary, or interlocutory, injunction is commonly applied for, upon notice, by simple motion or petition;⁷³ but the application is sometimes brought up by means of a rule to show cause why the injunction should not issue. Special injunctions can be obtained at almost any stage of the cause. They may be moved for

⁶⁵ See *Prout v. Starr* (1903) 188 U. S. 537, 539, 47 L. ed. 584, 585.

⁶⁶ *Du Pont v. Northern Pac. R. Co.* (1882) 18 Fed. 467; *Stafford v. King* (C. C. A.; 1898) 32 C. C. A. 536, 90 Fed. 126.

⁶⁷ *Metropolitan Grain v. Stock Exch. v. Chicago etc.* (1883) 15 Fed. 847.

⁶⁸ *Fenwick Hall Co. v. Saybrook* (1895) 66 Fed. 389.

⁶⁹ *St. Louis etc. Co. v. Carter etc.* Co. (1887) 31 Fed. 524.

⁷⁰ *Worth Mfg. Co. v. Bingham* (C. C. A.; 1902) 116 Fed. 785, 54 C. C. A.

⁷¹ *Central Trust Co. v. Wabash etc. R. Co.* (1885) 25 Fed. 1.

⁷² *Huntington v. New York* (1902) 118 Fed. 683, 688.

⁷³ *Toledo etc. R. Co. v. Pennsylvania* Co. (1893) 54 Fed. 730, 19 L.R.A. 387.

either before or after answer; and they may even be granted before the defendant has appeared.⁷⁴

§ 2317. Application after Proof Taken.

After the testimony on both sides has been taken and proof is complete for a hearing on the merits, the plaintiff may apply for an interlocutory hearing in order to obtain a preliminary injunction. The court has refused to entertain an application for a preliminary injunction made after the plaintiff has taken his proof, but before the defendant has taken his. Such a practice would put the defendant at a disadvantage, as it would force him to rely on affidavits merely. Such an application could, however, be maintained upon any special circumstances requiring it.⁷⁵

§ 2318. Service of Notice.

The notice of the application for a special injunction *pendente lite*, which is required to be given upon every such application, may be given in any manner conformable with the usage and practice of the courts of equity. It may be issued from the office of the clerk of the court and served by an officer; or it may be issued by the party who desires to obtain the injunction, or his solicitor, and may be served by him or his clerk in any mode allowed by local practice. It is not absolutely necessary that the notice should emanate from the clerk's office.⁷⁶

⁷⁴ 2 Dan. Ch. Pr. 344.

⁷⁵ Consolidated Retail Booksellers v. Ward (1904) 130 Fed. 389.

⁷⁶ *In re Ogles* (1899) 93 Fed. 432, Hammond, J. suggested that the notice of the application for an injunction, to be binding, must be issued from the court itself and that it cannot be issued by the parties. We can by no means accept this dictum as embodying the correct practice. The peculiar wording of equity rule 55 and of section 718 R. S. does indeed lend some countenance to that idea; but the language of those provisions is not such as to make the interpretation in question at all necessary, and as such interpretation is contrary to the usual practice of the court of equity, and contrary to good sense, it should not be accepted.

As we interpret equity rule 55, it means that the special injunction shall be grantable only by the court in term, or by a judge thereof in vacation, after

due notice has been given to the other party. The rule is not to be understood as requiring that the notice shall issue from the court or be granted by the judge. To get the true sense of the rule, it must be read as if the expression "upon due notice to the other party" were enclosed in a parenthesis, thus: "But special injunctions shall be grantable only (upon due notice to the other party) by the court in term," etc.

Section 718, R. S., should apparently be construed as if it read as follows: "Whenever notice is given of a motion for an injunction [to be issued] out of a circuit or district court, the court or judge thereof may, if there appears to be danger of irreparable injury from delay, grant an order restraining the act sought to be enjoined until the decision upon the motion." It is the *injunction* that is to be issued out of a circuit or district court, and not the *notice*.

§ 2319. Reasonable Period of Notice.

The period of time to elapse between the giving of notice of a motion for a preliminary injunction and the time fixed for the hearing of such motion should conform to the local rules of the court; and if this period is not fixed by these rules, the notice should be given at such time as to allow the defendant a reasonable opportunity to appear and contest the motion. What will constitute reasonable notice must depend upon the peculiar circumstances of each case. In some of the circuits four days' notice of the application must be given.⁷⁷

§ 2320. Service of Copy of Bill and Affidavits.

At the same time that the plaintiff serves notice of his motion for an injunction, he should serve a copy of his bill and a copy of any affidavits on which he proposes to rely to support the motion, where the local rules require such service of the bill and affidavits.⁷⁸

*Hearing of Motion for Injunction.***§ 2321. Mode of Proof Subject to Court's Control.**

The proceedings in regard to the hearing of a motion for an injunction are subject to the control of the court, within reasonable limits; and it has authority to define the mode in which the proofs shall be adduced. In the exercise of the discretion of the court, it is undoubtedly competent for it to require that the witnesses shall be examined and cross-examined upon formal deposition or in the presence of the court; and it may fix the time when the witnesses shall be tendered and the examinations completed. But of course the motion is commonly heard on the pleadings and affidavits as hereafter indicated.⁷⁹

⁷⁷ See local rules quoted in the succeeding note.

⁷⁸ *Hardt v. Liberty etc. Co.* (1886) 27 Fed. 788.

By equity rule No. 105 of the Circuit Court for the Southern District of New York a motion for an injunction will not be heard unless a copy of the bill and of the depositions—which term no doubt includes affidavits—to be offered in its support, shall be served on the adverse party or his attorney at least four days before motion is made.

No motion for an injunction shall be heard until four days after service of a copy of the bill and proofs on which the motion is based, upon the party to be

affected or his solicitor. But the plaintiff may obtain an order authorizing the motion on any shorter time, where the court is satisfied that such notice cannot be given without risk of injustice. After such notice, and until the party to be affected by the injunction is ready for a hearing, the injunction, if granted, shall be deemed to have been granted at the time notice of the motion was actually received, if the court sees fit to order the injunction as of the date of the notice. No. 10 of Rules in Equity of Circuit Court for E. D. Pennsylvania.

⁷⁹ By rule 12, in equity, of the circuit court for E. D. Pennsylvania, the

§ 2322. Determining Whole Cause on Motion for Injunction.

As a general rule it is not practicable for a court to undertake finally to dispose of a cause on a motion for a preliminary injunction, but situations occasionally arise where it is desirable and proper to do so. This step is sometimes taken even in the court of appeals.⁸⁰ But this court, like the lower court, will never determine a cause finally on an appeal from an order granting an interlocutory injunction, where the right of the controversy can only appear after full proof.⁸¹

§ 2323. Plaintiff's Proofs.

At the hearing of the motion, the plaintiff is permitted to rely on the statements of his sworn bill and on any affidavits in chief that he may see fit to adduce in support of his motion.⁸² If the affidavits accompanying a bill make out a proper case for the granting of an injunction, the injunction may be granted though the bill is not itself sworn to.⁸³

§ 2324. Use of Documents.

Documentary proof can be used in support of an application for a preliminary injunction, or in opposition to such a motion, where the document has the force of an affidavit and is sufficiently authenticated.⁸⁴ Exhibits accompanying the bill are to be considered in passing on the question of preliminary injunction.⁸⁵

§ 2325. Requisites and Scope of Plaintiff's Affidavits.

An affidavit in support of a motion or petition for an injunction should be confined to the case made in the bill. Any statements intro-

court is expressly empowered to have the witnesses examined, when it appears that the motion cannot be satisfactorily disposed of upon *ex parte* affidavits. Doubtless this rule must be considered as giving expression to a general principle that was already in existence.

⁸⁰ *Allegheny Oil Co. v. Snyder* (C. C. A.; 1900) 45 C. C. A. 604, 106 Fed. 764.

⁸¹ *City of Knoxville v. Africa* (1896) 77 Fed. 501, 510, 23 C. C. A. 252.

⁸² The sworn bill of the plaintiff is an affidavit in itself, and if the bill makes

out a good case for a preliminary injunction and is not met by a sufficient answer or by affidavits put in by the defendant, the plaintiff can of course obtain a preliminary injunction on the allegations of his bill alone. *Sullivan v. Redfield* (1825) 1 Paine 441; *Young v. Lippman* (1872) 9 Blatchf. 277.

⁸³ *Smith v. Schwed* (1881) 6 Fed. 455.

⁸⁴ *Schermehorn v. L'Espenasse* (1796) 2 Dall. 360, 1 L. ed. 415.

⁸⁵ *Miller v. Consolidated Lake Superior Co.* (1901) 110 Fed. 480.

ducing a new ground for relief will be disregarded.⁸⁶ The affidavits cannot enlarge the scope of the bill.⁸⁷

§ 2326. Defendant's Case in Opposition to Motion.

The defendant, on the other hand, can show cause against the allowance of an injunction in various ways. He may, for instance, move to dismiss the bill as having been irregularly filed, or he can demur, or plead.⁸⁸ The common mode of proceeding is by putting in a sworn answer and by producing such affidavits as may be available to the defendant for the purpose of controverting the plaintiff's claim to injunctive relief. The defendant may, however, resist the application by affidavits alone, before putting in his answer; but this course is seldom advisable. Where the allegations of the bill are fully met by the answer and affidavits, the preliminary injunction will be refused.⁸⁹

§ 2327. Sworn Answer Used as Affidavit by Defendant.

Though the oath be waived, the answer may nevertheless be sworn to and used as an affidavit against the motion for a preliminary injunction or upon a motion to dissolve the same. The verification in such case should conform to the requirements of affidavits. Thus, a verification to an answer intended to be so used is insufficient unless it appears that the party who swears to its statements has such information as to enable him to speak of his own knowledge. Verification by a solicitor made merely on his belief or information and belief without a showing that he has personal knowledge of the facts stated is not good.⁹⁰

§ 2328. Demurrer Not Overruled by Answer Used as Affidavit.

Upon the hearing of an application for a preliminary injunction, the sworn answer of the defendant is used as an affidavit and not as a pleading. Hence that rule of pleading by which an answer to the

⁸⁶ *Montgomery etc. Co. v. Chapman* Court for S. D. New York. The term "deposition," as used in this rule, is (1904) 128 Fed. 197.

⁸⁷ *Leo v. Union Pac. Ry. Co.* (1883) 17 Fed. 273. evidently to be understood as including affidavits.

⁸⁸ The defendant may show cause against the allowance of an injunction either by plea, answer, or demurrer to the bill or by parol exception to its legal sufficiency or by deposition disproving the equity on which the motion is founded. No. 106 of Rules of Circuit

⁸⁹ *Mitchell v. Colorado etc. Co.* (1902) 117 Fed. 723; *Cohen v. Delavina* (1900) 104 Fed. 946.

⁹⁰ *Lake Shore etc. Co. v. Felton* (C. C. A.; 1900) 103 Fed. 227. 43 C. C. A. 189.

whole bill is held to overrule a demurrer to the whole bill does not apply. Consequently a defendant who demurs to the whole bill and answers to the whole may, upon the hearing of the application, have the benefit of his answer as an affidavit and may also have the benefit of his demurrer; and if the demurrer is good, the bill will be dismissed, notwithstanding the defendant has answered fully.

Cosmos Exploration Co. v. Gray Eagle Oil Co. (1900) 104 Fed. 20: Upon the filing of the bill, an order was made on the defendant to show cause why a preliminary injunction should not be granted. The defendant appeared by counsel and filed demurrers to the bill for want of equity and for want of jurisdiction. He also filed a verified answer for the purpose of meeting the application for an injunction. Affidavits were filed on both sides. The demurrer and order to show cause were heard together, the verified answer being used as an affidavit. The court denied the application for an injunction, sustained the demurrers, and dismissed the bill. No question was raised on the point that the answer had overruled the demurrer; but obviously such point would not have been well taken, and the case was rightly disposed of.

§ 2329. Affidavits in Rebuttal Admissible Only by Leave of Court.

The affidavits that the plaintiff and defendant are respectively allowed to put in at the hearing of a motion for a preliminary injunction are original affidavits. The plaintiff's affidavits must be such as support his bill, and the defendant's affidavits must be such as meet the case made in the bill and such as support the defense shown in his answer (where an answer has been filed). In the present state of the practice of the federal courts, it is not permissible for the plaintiff, after his original affidavits have been filed and after they have been met by affidavits of the defendant, to file other affidavits to rebut the affidavits of the defendant, unless he has obtained leave of court to put in affidavits in rebuttal; and if he does put in affidavits in rebuttal without leave, they will be disregarded. He must rely on his bill and on his original affidavits.⁹¹ Similarly, when a defendant moving for the dissolution of an injunction puts in affidavits and his adversary puts in counter-affidavits, the moving party cannot then put in additional affidavits except by permission of the court; and this will not usually be granted unless the counter-affidavits that are to be met contain new and affirmative matter. Each party should, as far as possible, present his whole case in one set of affidavits.⁹² By local rules

⁹¹ *Benbow-Brammer Mfg. Co. v. Simpson Mfg. Co.* (1904) 132 Fed. 614. ⁹² *Hardt v. Liberty etc. Co.* (1896) 27 Fed. 788.
Compare American Paper Barrel Co. v. Laraway (1896) 28 Fed. 141.

in some of the districts, the court is allowed, in its discretion, to admit affidavits on the part of the plaintiff rebutting the proofs offered by the defendant.⁹³ A court evidently has ample discretion in this respect without the aid of a rule.

§ 2330. Affidavits in Surrebuttal.

A court has discretion to admit affidavits, on the part of either party, in surrebuttal, to meet the rebuttal affidavits of the other party. But the mere granting of leave to a plaintiff to put in rebuttal affidavits and the introduction of such affidavits by him, does not of itself authorize the defendant to put in affidavits in surrebuttal.⁹⁴ The defendant should in such case apply to the court and obtain express leave to put in the affidavits in surrebuttal.

§ 2331. Affidavits Taken after Expiration of Time Allowed.

After the expiration of the time fixed by stipulation for the taking and filing of affidavits, neither of the parties may without permission of the court adduce other affidavits; and if any be filed, they will be disregarded.⁹⁵

§ 2332. Weight of Affidavits and Other Proof.

In weighing the evidentiary value of affidavits on motions for the granting or dissolution of an injunction, the court is not controlled by the mere number of the affiants. Here as elsewhere the preponderance of evidence does not depend on the number of witnesses but on their information, candor, and apparent truthfulness.⁹⁶

In considering the propriety of granting a preliminary injunction on the case made by the bill, answer, and affidavits, the court is entitled to draw inferences unfavorable to one of the parties who presumably has it in his power to show the exact state or condition of facts on a particular material point but fails to do so.⁹⁷ The failure

⁹³ Further proofs may be allowed in practice in patent cases, see Amendment of May 18, 1846, to Equity Rules for that circuit.

⁹⁴ American Paper-Barrel Co. v. Laraway (1886) 28 Fed. 141.

⁹⁵ Ford v. Taylor (1905) 140 Fed. 356. See Cohen v. Delavina (1900) 104 Fed. 946.

⁹⁶ Harriman v. Northern Securities Co. (1904) 132 Fed. 464 (reversed on other point) (1905) 197 U. S. 244, 49 L. ed. 739.

⁹⁷ "The reception of such additional proofs is not to permit the introduction of further proofs in opposition thereto, by the defendant, previous to the final hearing upon the merits." Equity Rule 107 of Rules of Circuit Court for S. D. New York. As to the Eq. Prac. Vol. II.—86.

of the answer to deny a material allegation of the bill is a strong argument in favor of granting the preliminary injunction even though such allegation be denied in affidavits.⁹⁸

Use of Affidavits to Contradict Answer.

§ 2333. Affidavits Not Permitted under Former Practice.

Of late years the practice of the courts of equity in regard to the use of affidavits at the hearing of a motion for an injunction or at the hearing of a motion to dissolve an injunction has undergone considerable change; and as may be readily supposed, this change has been in the direction of the more liberal admission of affidavits. The rule in the English chancery was that the plaintiff could use affidavits in support of his bill where the application for the injunction was made before the defendant had put in his answer but not after an answer was filed. If the plaintiff, instead of applying for the injunction upon affidavits before answer, waited until the defendant had answered, he was compelled to rest his claim to an injunction upon the disclosures made in the answer; and he was not entitled, either for the purpose of obtaining or of continuing an injunction, to read any affidavits in opposition to the answer.⁹⁹ Lord Eldon once observed that if the answer denies all the circumstances upon which the equity is founded, affidavits to contradict the answer are not admissible. "Though five hundred affidavits were filed, not only by the plaintiff, but by many witnesses, not one could be read as to this purpose."¹⁰⁰ The situation where the rule was longest and most firmly insisted upon was that in which the question at issue was one of title.¹⁰¹ It was considered that the matter of title ought not to be decided collaterally upon affidavits, where the defendant had answered, but only upon the plain admissions of the answer.

§ 2334. Exceptions to This Rule.

The rule prohibiting the use of affidavits to contradict the answer was partly based on the weight attributed to the sworn answer, considered as evidence for the defendant; and it was partly based, no doubt, upon the idea that inasmuch as the injunction *pendente lite*

⁹⁸ Sperry etc. Co. v. Brady (1905) 134 Fed. 691.

⁹⁹ 1 Smith, Ch. Pr. (2d ed.) 595, 596.

¹⁰⁰ Clapham v. White (1802) 8 Ves. Jr. 36, 37.

¹⁰¹ Norway v. Rowe (1812) 19 Ves. Jr. 150; Strathmore v. Bowes (1786) 2 Bro. Ch. 88, 2 Dick. 673; Poor v. Carleton (1837) 3 Sumn. 70; U. S. v. Parrott (1858) 1 McAll. 271; 3 Dan. Ch. Pr. 356.

embodies an extraordinary exercise of judicial power, it should not be granted unless the defendant admitted the material facts alleged in the bill. However, the rule was found to be unsatisfactory in the English chancery, and a number of exceptions were engrafted on it. An exception was first admitted, it seems, in cases of waste and mischiefs analogous to waste, where there appeared to be danger of irreparable injury.¹⁰² An exception was next made in cases where an injunction and receiver were sought in partnership suits.¹⁰³ The rule was further undermined by a recognition of the principle that, while a plaintiff might not introduce affidavits directly to contradict the answer, he might yet introduce affidavits tending to establish pertinent facts collateral to the statements contained in the answer; and if material allegations made in the bill were neither admitted nor denied in the answer, affidavits could be received in support of such statements contained in the bill.¹⁰⁴ Again, it was a recognized principle that before the putting in of an answer could operate to deprive the plaintiff of the right to rely upon affidavits in opposition to the answer, the answer must be responsive to the bill and must be based on the personal knowledge of the defendant, not upon mere hearsay or upon information and belief.¹⁰⁵

§ 2335. Present Practice—Affidavits Admissible to Show Danger of Injury.

The rule having been thus much impaired, the idea finally became accepted, or at least in the American courts, that inasmuch as every application for a special injunction or for the dissolution of such injunction rests in the sound discretion of the court, there is really no reason why the court may not, in its discretion, admit affidavits to contradict a sworn answer upon any and every point whatever, where it should appear that irreparable mischief might otherwise be done. Nearly three-quarters of a century ago Judge Story noted the fact that the practice in regard to the use of affidavits upon these applications was rather unsettled, and was decidedly more liberal in America than in England; and this learned judge emphatically said that he would not hesitate to admit affidavits against an answer wherever irreparable injury might arise from denial of the injunction.¹⁰⁶ This observation was made, it will be noted, long before the rule of practice

¹⁰² *Hicks v. Michael* (1860) 15 Cal. 116.

¹⁰³ 1 Smith, Ch. Pr. (2d ed.) 596.

¹⁰⁴ 1 Smith, Ch. Pr. (2d ed.) 597.

¹⁰⁵ *Poor v. Carleton* (1837) 3 Sumn. 70, Fed. Cas. No. 11,272.

¹⁰⁶ *Poor v. Carleton* (1837) 3 Sumn. 70, 83, *post*, § 2411.

was adopted which permits the plaintiff to waive the answer under oath; and the adoption of this latter rule supplies an additional reason for now allowing affidavits to be used against the answer, since it is obvious that the sworn answer, where the oath is waived, can be nothing more than a mere affidavit.¹⁰⁷ At any rate, the modern practice admits affidavits against the allegations of the answer wherever the purpose of the affidavit is to show a likelihood of irreparable injury. The actual practice of the courts in regard to the admission of affidavits against the statements of the answer seems, however, to be decidedly more liberal than the language of the decisions even in this day and time would seem to imply, as the statement that affidavits are not admissible against the answer, save in exceptional cases, such as waste, is still sometimes found in the cases.¹⁰⁸

¹⁰⁷ In England it is provided by 15 and 16 Vict. ch. 86, sec. 59, that the answer of the defendant shall be regarded merely as an affidavit, and that affidavits may be received and read in opposition thereto.

¹⁰⁸ *Champlain Const. v. O'Brien* (1900) 104 Fed. 930.

In *U. S. v. Parrott* (1858) 1 McAll. 271, the old rule of practice is adhered to. But it must be considered that this and similar decisions are obsolete.

CHAPTER LVII.

INJUNCTIONS (*continued*).

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Principles Governing Exercise of Discretion.

§ 2336. Discretion of Court as to Granting of Injunction.

The granting of an application for a preliminary injunction is a matter of sound judicial discretion,¹ to be exercised upon the particular circumstances of each case.² As was said by one of the federal

¹ 3 Dan. Ch. Pr. 297.

² 99, 24 L. ed. 381; Edison Electric Light

² *Buffington v. Harvey* (1877) 95 U. S. Co. v. Buckeye Electric Co. (1894) 64

judges in an early case: "There is no power the exercise of which is more delicate, which requires greater caution, deliberation, and sound discretion, or [which is] more dangerous in a doubtful case than the issuing an injunction. It is the strong arm of equity, that never ought to be extended unless to cases of great injury, where courts of law cannot afford an adequate or commensurate remedy in damages. The right must be clear, the injury impending or threatening, so as to be avoided only by the protecting, preventing process of injunction." ³

§ 2337. Considerations Bearing on Exercise of Discretion.

The general principles by which the courts are governed in passing on applications for interlocutory injunctions, and in determining whether the circumstances of any particular case are sufficient to justify the issuance of the writ, have been judicially stated with much variety of phrasing in innumerable cases. The following extracts from opinions rendered in federal courts contain about as good a description of the conditions under which the writ ought to be issued, or refused, as could probably be found.

1. *Harriman v. Northern Securities Co.* (1904) 132 Fed. 464, 475: The considerations that govern the exercise of judicial discretion in passing upon an application for a preliminary injunction were well stated in this case as follows: "The granting or refusal of a preliminary injunction, whether mandatory or preventive, calls for the exercise of a sound judicial discretion in view of all the circum-

Fed. 225, 228; *Shinkle etc. Co. v. Louisville etc. R. Co.* (1894) 62 Fed. 690; *Norton v. Hood* (1882) 12 Fed. 763; (1882) 20 Blatchf. 396; *Andrae v. Red-Chicago etc. Co. v. Dey* (1888) 35 Fed. 866, 1 L.R.A. 744; *Western Union Tel. Co. v. Mayor etc. New York* (1889) 38 Fed. 552, 3 L.R.A. 449; *Northern Pac. R. Co. v. St. Paul etc. R. Co.* (1891) 47 Fed. 536; *Indianapolis Gas Co. v. Indianapolis* (1897) 82 Fed. 245; *Sanitary Reduction Works v. California etc. Co.* (1899) 94 Fed. 603, 607; *Charles v. City of Marion* (1899) 98 Fed. 166; *Board of Trade v. C. B. Thompson etc. Co.* (1900) 103 Fed. 802; *Miller v. Consolidated etc. Co.* (1901) 110 Fed. 486; *Wallace v. Arkansas Cent. R. Co. (C. C. A.; 1902) 118 Fed. 422, 55 C. C. A. 192; Tampa Waterworks Co. v. Tampa* (1903) 124 Fed. 932; *Western Union Tel. Co. v. Philadelphia etc. R. Co.* (1903) 124 Fed. 974; *Napier v. Westenhoff* (1905) 128 Fed. 420; *Shoemaker v. National Mechanics' Bank* (1869) 2 Abb. (U. S.) 416; *New York Grape Sugar Co. v. American Grape Sugar Co.* (1882) 20 Blatchf. 396; *Andrae v. Redfield* (1875) 12 Blatchf. 407; *Fairbanks v. Jacobus* (1877) 14 Blatchf. 337; *Ayling v. Hull* (1865) 2 Cliff. 494; *Clum v. Brewer* (1885) 2 Curt. C. C. 506; *Wells v. Gill* (1872) 6 Fisher Pat. Cas. 89; *Singer Mfg. Co. v. Union Button-hole etc. Co.* (1873) 6 Fisher Pat. Cas. 490; *Earth Closet Co. v. Fenner* (1871) 5 Fisher Pat. Cas. 15; *Irwin v. Dane* (1871) 4 Fisher Pat. Cas. 359; *Tucker v. Carpenter* (1841) Hempst. 440; *Lawrence v. Bowman* (1858) 1 McAll. 419; *Batten v. Silliman* (1885) 3 Wall. Jr. 124; *Goodyear v. Day* (1862) 2 Wall. Jr. 283; *Orr v. Littlefield* (1845) 1 Woodb. & M. 13.
³ *Baldwin, J. in Bonaparte v. Camden and Amboy R. Co.* (1830) Baldw. 217, 218. (Quoted with approval in *Truly v. Wanzer* (1847) 5 How. 142, 12 L. ed. 83.)

stances of the particular case. Regard should be had to the nature of the controversy, the object for which the injunction is sought, and the comparative hardship or convenience to the respective parties involved in the awarding or denial of the injunction. The legitimate object of a preliminary injunction, preventive in its nature, is the preservation of the property or rights in controversy until the decision of the case on a full and final hearing upon the merits or the dismissal of the bill for want of jurisdiction or other sufficient cause. The injunction is merely provisional. It does not, in a legal sense, finally conclude the rights of parties, whatever may be its practical operation under exceptional circumstances. In a doubtful case, where the granting of the injunction would, on the assumption that the defendant ultimately will prevail, cause greater detriment to him than would, on the contrary assumption, be suffered by the complainant, through its refusal, the injunction usually should be denied. But where, in a doubtful case, the denial of the injunction would, on the assumption that the complainant ultimately will prevail, result in greater detriment to him than would, on the contrary assumption, be sustained by the defendant through its allowance, the injunction usually should be granted. The balance of convenience or hardship ordinarily is the factor of controlling importance in cases of substantial doubt existing at the time of granting or refusing the preliminary injunction. Such doubt may relate either to the facts or to the law of the case, or to both. It may equally attach to, or widely vary in degree as between, the showing of the complainant and that of the defendant, without necessarily being determinative of the propriety of allowing or denying the injunction. Where, for instance, the effect of the injunction would be disastrous to an established and legitimate business, through its destruction or interruption in whole or in part, strong and convincing proof of right on the part of the complainant and of the urgency of his case is necessary to justify an exercise of the injunctive power. Where, however, the sole object for which an injunction is sought, is the preservation of a fund in controversy, or the maintenance of the *status quo*, until the question of right between the parties can be decided on final hearing, the injunction properly may be allowed, although there may be serious doubt of the ultimate success of the complainant. Its allowance in the latter case is a provisional measure, of suspensive effect, and in aid of such relief, if any, as may finally be decreed to the complainant.”⁴

2. *Allison v. Corson* (C. C. A.; 1898) 88 Fed. 581, 32 C. C. A. 12, *per* Sanborn, Circuit Judge: “The controlling reason for the existence of the right to issue a temporary injunction is that the court may thereby prevent such a change of the conditions and relations of persons and property during a litigation as may result in irremediable injury to some of the parties before their claims can be investigated and adjudicated. Undoubtedly an injunction ought not to be issued unless substantial questions of law or fact, whose decision in favor of the moving party would entitle him to ultimate relief, are presented. If it is reasonably clear that he cannot ultimately succeed,—if his pleading discloses no cause of action or defense,—no injunction should be granted. But if the questions to be ultimately settled are serious and doubtful, and if the injury to the moving party will be certain, great, and irreparable if the motion is denied and the final

⁴ The decision in this case was re-stated in the principal case. See *Harri-versed in the appellate courts but upon man v. Northern Securities Co.* (1905) grounds not affecting the principles 197 U. S. 244, 49 L. ed. 739.

decision is in his favor, while, if the decision is otherwise, the inconvenience and loss to the opposing party will be inconsiderable, and may well be indemnified by a proper bond, if the injunction is granted, it is the duty of the chancellor to issue it. A preliminary injunction, maintaining the *status quo*, may properly issue whenever the questions of law or fact to be ultimately determined in a suit are grave and difficult, and injury to the moving party will be immediate, certain, and great if it is denied, while the loss or inconvenience to the opposing party will be comparatively small and insignificant if it is granted."

§ 2338. Scope of Inquiry Limited to Existing Situation.

On an application for a preliminary injunction, the court is not required to pass on the merits, and usually it would be improper for it to attempt to do so. The question is not as to the final merit, but whether the allegations of the bill and affidavits, if any there be, are sufficient to justify the granting of an injunction *pendente lite*.⁵ Upon motion for a preliminary injunction, the court concerns itself more particularly with what may be called the external situation.⁶

Buskirk v. King (C. C. A.; 1896) 72 Fed. 22, 18 C. C. A. 418: Pending an action of ejectment at law to recover land, the plaintiff filed a bill in equity for an injunction to prevent the defendant from cutting and removing timber. The court of appeals stated the considerations that govern the granting of injunctions in such cases as follows: "Courts of equity are not to be regarded as in any manner forestalling the final action of courts of law on the questions involved when they grant the temporary relief afforded by interlocutory injunctions. In doing so they simply adjudge that the plaintiff presents such a case as justifies the court in preserving the *status quo* until a court of law has had an opportunity, with all the facts before it, and with the assistance of a jury, of determining the real merits of the controversy. In such matters the plaintiff is not required to make out such a case as will entitle him to a decree in his favor on final hearing, and it sometimes happens that he ultimately fails to secure the relief asked for, while, nevertheless, the granting of the preliminary injunction was eminently proper. . . . While it is true that under the ancient rules of courts of equity parties were left to their legal remedies in cases of trespass, it is equally true that at this time the practice prevails of allowing injunctions in such cases where the injury is irreparable. The true foundation of this jurisdiction is the probability of permanent injury to the property in dispute, the inadequacy of pecuniary compensation, and the prevention of a multiplicity of suits."⁷

⁵ *New Memphis etc. Co. v. Memphis* (1896) 72 Fed. 952; *Cartersville Light etc. Co. v. Cartersville* (1902) 114 Fed. 699. ⁷ *Erhardt v. Boaro* (1895) 113 U. S. 537, 5 Sup. Ct. 565, 28 L. ed. 1116; *U. S. v. Gear* (1845) 3 How. 120, 11 L. ed. 523.

⁶ *St. Paul etc. R. Co. v. Northern Pac. R. Co.* (1892) 49 Fed. 306, 308, 1 C. C. A. 246.

§ 2339. Considerations Affecting Essential Jurisdiction of Court.

A substantial doubt as to whether the federal court has essential jurisdiction of the suit will justify a refusal on the part of the court to grant a preliminary injunction, though the question of jurisdiction is not primarily under consideration and is left undetermined on such motion.⁸

A preliminary injunction will not be granted where an indispensable party has not been brought in, without whom a decree could not be given on the merits in plaintiff's favor.⁹

§ 2340. Existence of Adequate Legal Remedy.

A preliminary injunction will not be granted where the case stated in the bill is not of equitable cognizance, there being an adequate remedy at law.¹⁰ In such case the plaintiff should sue at law and, if necessary, file a bill solely for an injunction pending the suit at law.

§ 2341. Clear Case for Issuance of Writ Must Be Made Out.

A prerequisite to the allowance of a preliminary injunction is that the plaintiff should show a clear title to relief, or one free from reasonable doubt, and that he should set forth acts done or threatened by the defendant which, if not restrained, will seriously or irreparably injure his rights.¹¹ A preliminary injunction proceeding on the ground of the invalidity of a statute will not be granted unless it is

⁸ *Huntington v. City of New York* A.; 1901) 106 Fed. 771, 45 C. C. A. (1902) 118 Fed. 683; *Farson v. Chicago* 611.

(1905) 138 Fed. 184; *Smith v. Alexander* (1906) 146 Fed. 106; *Land Co. of New Mexico v. Elkins* (1884) 20 Fed. 545 (want of jurisdiction over one defendant sufficient to justify refusal of preliminary injunction); *Carson v. Combe* (C. C. A.; 1898) 86 Fed. 202, 29 C. C. A. 660. (The question of jurisdiction was said in this case to be of such gravity and vital character that the appellate court refused to pass on it prematurely on an appeal from the interlocutory order, and therefore the injunction was continued.)

⁹ *Taylor v. Southern Pac. R. Co.* (1903) 122 Fed. 147.

¹⁰ *Davidson v. Calkins* (1899) 92 Fed. 230.

¹¹ *Stevens v. Missouri etc. Co.* (C. C. 132 Fed. 614.

A person having a temporary right to the exclusive use of stock exchange quotations cannot obtain an injunction against another to prevent the unauthorized use of those quotations without showing that the alleged illegal user occurs while the plaintiff's exclusive right continues. *Board of Trade etc. v. Consol. Stock Exch.* (1903) 121 Fed. 433.

A preliminary injunction will not be granted in an infringement case unless the fact of infringement clearly appears. The circumstance that the court of another circuit has adjudged that infringement exists in regard to the same patent, is persuasive. *Benbow-Brammer Mfg. Co. v. Simpson Mfg. Co.* (1904)

quite clear that the statute cannot stand or that there is great danger of irreparable injury.¹²

As a general principle, suits should be left untrammelled by injunction or decretal orders until the final hearing, except in clear cases of necessity.¹³ A preliminary injunction hurtful to the defendant will not be granted unless it is absolutely necessary to secure the plaintiff in a right not otherwise capable of being adequately protected.¹⁴

Morris v. Bean (1903) 123 Fed. 618: A proprietor who had a prior right to the use of water for irrigating purposes sought to enjoin other proprietors located farther up the stream from diverting the water so as thereby to deprive the plaintiff of his proper supply. A preliminary injunction was refused because the plaintiff's bill did not show that any growing crops were then in need of an immediate supply of water.¹⁵

§ 2342. Showing of Irreparable Injury.

Before an injunction can be issued there must be a showing of violated right, or of threatened violated right, and of definite and tangible injury that will be irreparable.¹⁶ In a suit that contemplates the ultimate recovery of damages as one of its objects, the fact that the defendant is fully responsible financially supplies a reason for refusing an injunction, especially in a case where the granting of it is

¹² *Ryan v. Williams* (1900) 100 Fed. 177.

¹³ In *Paul Steam System Co. v. Paul* (1904) 129 Fed. 757, the court, speaking with particular reference to the practice prevailing in the Circuit Court for the District of Massachusetts, observed that injunctions *pendente lite* are refused in that circuit, "unless the case shows beyond reasonable question the necessity for such intervention of the court."

¹⁴ *Seecomb v. Wurster* (1897) 83 Fed. 856, 861.

¹⁵ Further illustrations of situations that have been considered insufficient to justify the granting of a preliminary injunction are found in these cases: *Witman v. Hubbell* (1887) 42 Fed. 633; *Spokane St. Ry. Co. v. City of Spokane Falls* (1891) 46 Fed. 322; *Kimball v. Atchison etc. Co.* (1891) 46 Fed. 888; *Interstate Commerce Commission v. Lehigh Val. R. Co.* (1892) 49 Fed. 177; *Pullman's Palace Car Co. v. Missouri etc. Co.* (1893) 55 Fed. 138; *United States v. Southern Pac. R. Co.* (1893) 55 Fed. 566; *Capital City etc. Co. v. Des*

Moines (1896) 72 Fed. 829; *Consolidated Fastener Co. v. Traut etc. Co.* (1897) 81 Fed. 383; *Otaheite Gold etc. Co. v. Dean* (1900) 102 Fed. 929; *Central Stock Yards Co. v. Louisville etc. Co.* (1902) 112 Fed. 823; *Montgomery Ward & Co. v. South Dakota etc. Assoc.* (1907) 150 Fed. 413, 418.

In *New York Ventilator Co. v. American Institute* (1885) 24 Fed. 561, the court refused to enjoin the delivery of a medal to one manufacturer upon bill filed by a disappointed competitor, the judging of the award being so entirely within the discretion of the judges.

For conditions under which a preliminary injunction should not be issued in a patent case, see *Whippany Mfg. Co. v. United Indurated Fibre Co.* (C. C. A.; 1898) 87 Fed. 215, 30 C. C. A. 615; *Richmond Mica Co. v. De Clyme* (1898) 90 Fed. 661; *Hall Signal Co. v. General R. etc. Co.* (C. C. A.; 1907) 153 Fed. 907, 82 C. C. A. 653.

¹⁶ *Blindell v. Hagan* (1893) 54 Fed. 40; *Ahern v. Newton etc. Co.* (1900) 105 Fed. 702; *Halstead v. John C. Winston Co.* (1901) 111 Fed. 35.

otherwise of doubtful propriety.¹⁷ But where the plaintiff's right to an injunction is otherwise clearly made out, the solvency of the defendant is immaterial; and the defendant cannot defeat the right to the injunction by tendering security for damages.¹⁸

The title to land being in controversy a preliminary injunction to prevent the defendant from conveying it to one of the states will be granted; for the state not being subject to suit, the title to the property would thereby be irretrievably lost.¹⁹

§ 2343. Injunction Not Grantable on Showing of Doubtful Right.

An injunction will not be granted upon a conflicting and doubtful showing. The remedy is an extraordinary one, and the right to it should be clearly made out.²⁰ The injunction *pendente lite* has been said to be very like an execution before judgment and consequently should be issued only in clear cases of right.²¹ There should be a reasonable certainty that the plaintiff will succeed at the final hearing; and if this is not made to appear, the writ will usually be denied.²² Substantial doubt as to the existence of the right on which the claim to relief is based makes a refusal of a preliminary injunction proper.²³

A preliminary injunction will not be granted where the right to have an injunction depends on an issue that can be properly determined only when full proof is taken.²⁴

§ 2344. Injunction Proper Where Plaintiff's Right Clear.

In the absence of some strong equity to the contrary, the plaintiff is entitled to a preliminary injunction where it is obvious that he

¹⁷ *Paine v. United States Playing-Card Co.* (1898) 90 Fed. 543.

¹⁸ *Sickels v. Mitchell* (1857) Fed. Cas. No. 12,835; *Hodge v. Hudson R. Co.* (1868) Fed. Cas. No. 6,560; *Consolidated Fruit Jar Co. v. Whitney* (1874) Fed. Cas. No. 3,132.

¹⁹ *Lee v. Simpson* (1888) 37 Fed. 12, 2 L.R.A. 659.

²⁰ *Parker v. Winnipiseogee Lake Cotton etc. Co.* (1862) 2 Black 552, 17 L. ed. 337; *Irwin v. Dixon* (1850) 9 How. 33, 13 L. ed. 35; *Pennsylvania v. Wheeling etc. Bridge Co.* (1851) 13 How. 587, 14 L. ed. 278.

²¹ *Amelia Milling Co. v. Tennessee Coal etc. Co.* (1903) 123 Fed. 811.

²² *Union Switch etc. Co. v. Philadelphia R. R. Co.* (1896) 75 Fed. 1004.

²³ *American Preservers' Co. v. Norris* (1890) 43 Fed. 711; *Weidenfeld v. Al-
leghey etc. Co.* (1891) 47 Fed. 11; *Kilburn v. Ingersoll* (1895) 67 Fed. 46; *De Neufville v. New York etc. Co.* (1898) 84 Fed. 391; *Miller v. Morley etc. Co.* (C. C. A.; 1898) 87 Fed. 621, 31 C. C. A. 148; *Empire Circuit Co. v. Jermon* (1905) 147 Fed. 532, 534; *Home Insurance Co. v. Nobles* (1894) 63 Fed. 642; *Brooklyn Base Ball Club v. McGuire* (1902) 116 Fed. 782; *Mitchell v. Colorado etc. Co.* (1902) 117 Fed. 723.

²⁴ *Paine v. U. S. Playing-Card Co.* (1898) 90 Fed. 543; *Board of Trade of City of Chicago v. C. B. Thomson Commission Co.* (1900) 103 Fed. 902.

must prevail on the merits and in the end obtain a final injunction.²⁵ The writ will never be withheld where its issuance is necessary to prevent injustice.²⁶

§ 2345. Doubtful Question of Law.

If doubtful questions of law are raised in a suit and the evidence is conflicting the court will not grant a temporary injunction,²⁷ unless it appears to be desirable for the purpose of maintaining the *status quo* and none other.²⁸ But if, in its general aspects, the bill presents a case of probable right and probable danger thereto, the court may, in its discretion, grant the writ.²⁹

§ 2346. Consideration of Right of Appeal.

The circumstance that no appeal lies from an interlocutory order refusing to grant a preliminary injunction, while on the contrary an appeal does lie from an interlocutory order granting the injunction, is entitled to no weight in a clear case, yet it may conceivably sometimes be allowed some weight in a doubtful situation. Such consideration, so far as it is allowed to operate, makes in favor of the granting of the injunction.³⁰ The consideration in question is never conclusive; and if a plaintiff is clearly not entitled to a preliminary injunction, it will be refused, though the plaintiff has no appeal.³¹

§ 2347. Consideration of Balance of Convenience.

On a motion for a preliminary injunction, it is proper for the court to inquire not only whether serious and irreparable damage will be done to the plaintiff if the temporary injunction is refused, but also to inquire whether or not the defendant, by the granting of the injunction, will suffer injury disproportionately greater.³² It has been truly said that "preliminary injunctions are granted on a balance of convenience."³³ In a case where the issuance of the prelimi-

²⁵ Allington etc. Mfg. Co. v. Booth (C. C. A.; 1897) 78 Fed. 878, 24 C. C. A. 378. ²⁹ New Memphis etc. Co. v. City of Memphis (1896) 72 Fed. 952.

²⁶ Continuous Glass Press Co. v. Schmertz Wire Glass Co. (C. C. A.; 1907) 153 Fed. 577, 82 C. C. A. 587. ³⁰ Harriman v. Northern Securities Co. (1904) 132 Fed. 464, 485.

²⁷ Home Ins. Co. v. Nobles (1894) 63 Fed. 642; Cosmos Exploration Co. v. Gray Eagle Oil Co. (1900) 104 Fed. 32; Mitchell v. Colorado Fuel & Iron Co. (1902) 117 Fed. 723. ³¹ Edison Electric Light Co. v. Buckeye Electric Co. (1894) 64 Fed. 225, 228.

²⁸ Cartersville Light & Power Co. v. City of Cartersville (1902) 114 Fed. 699. ³² Sampson etc. Co. v. Seaver Radford Co. (1904) 129 Fed. 761. ³³ Taft, Circuit Judge, in New England etc. Co. v. Oakwood etc. Co. (1895) 71 Fed. 52.

nary injunction can cause no substantial loss to any one in any event, while the failure to issue it may result in the total loss by the plaintiff of all his right and claim in the subject-matter, the temporary injunction should be issued, unless it be reasonably clear that his alleged ground of action is altogether without any just foundation.³⁴ On the other hand, if it appears that the granting of the injunction would be destructive of the entire business of the defendant or would inflict much damage upon him, while the refusal of it would not seriously affect the plaintiff's rights, the writ will be refused.³⁵ A preliminary injunction that would have the effect of changing the method and system of the defendant and of interfering radically with his business will not be granted except in the clearest sort of a case and where there is some exigency requiring it.³⁶

A preliminary injunction to prevent a sale of property for taxes will be granted almost as of course in a suit plausibly attacking the validity of the law under which the sale is threatened, for the inconvenience and damage that would result to the plaintiff from the creation of a cloud on his title is much greater than the inconvenience that will result to the public authorities from a delay of the sale.³⁷

§ 2348. Adoption of Course Most Conducive to Minimum Injury.

Upon considering the propriety of granting a preliminary injunction, the court will always endeavor so to protect the rights of all the parties to the suit that whatever may be the ultimate decision the injury to each will be reduced to the minimum.³⁸

New Memphis Gas etc. Co. v. Memphis (1896) 72 Fed. 952: Upon application for a preliminary injunction to prevent the putting of a municipal ordinance fixing gas rates into effect, plaintiff's contention being that those rates were unreasonable and confiscatory, the court granted the injunction and observed: "The public can be protected by a bond in a suitable sum, with condition to refund either to the persons who consume gas, or to the taxing district, for the use and benefit of such persons, all sums which may be charged over the rate fixed by this ordinance, in the event plaintiff's bill shall fail. . . . It will not be difficult to thus reimburse fully each purchaser of gas for the excess which may be paid over the rates fixed by the ordinance, if finally sustained, and no serious injury can therefore result to the public, while to refuse the injunction would possibly result in the destruction of the plaintiff's business and property before this litigation can be terminated."

³⁴ *Allison v. Corson* (C. C. A.; 1898) 88 Fed. 581, 32 C. C. A. 12.

³⁵ *Amelia Milling Co. v. Tennessee etc. Co.* (1903) 123 Fed. 811.

³⁶ *Gring v. Chesapeake etc. Canal Co.* (1904) 129 Fed. 996.

³⁷ *Lyon v. Tonawanda* (1899) 98 Fed. 361.

³⁸ *Denver etc. R. Co. v. U. S.* (C. C. A.; 1903) 59 C. C. A. 579, 124 Fed. 159.

§ 2349. Consideration of Injury to Third Person.

The circumstance that a third person may be directly or indirectly injured by the operation of the preliminary injunction, supplies a reason for refusing it which may well be decisive in doubtful cases.³⁹ This consideration is of special force when that third party is the general public.

Stein v. Bienville Water Supply Co. (1887) 32 Fed. 876: The plaintiff claiming to have the exclusive right to supply the inhabitants of a city with water sought to enjoin the defendant company from interfering with its monopoly. Affidavits were filed which tended to show that the city was not being supplied by the plaintiff with such a water supply as the public health and public safety required. In refusing a preliminary injunction Mr. Justice Harlan observed that the discretion of the court in regard to the granting of preliminary injunctions must be exercised so as to avoid possible harm of a serious character to the general public. But an injunction was granted against the doing of injury by the defendant to the plaintiff's mains and conduits.

§ 2350. Injunction to Preserve Status Quo.

The class of cases in which a preliminary injunction will be most readily granted is that where the purpose of the injunction is to maintain the *status quo* until the controverted right is determined. Such an injunction will usually be granted where it appears that the plaintiff has a good *prima facie* cause of action, and without the injunction his suit would be fruitless, even if he should finally win on the merits.⁴⁰ A preliminary injunction maintaining the *status quo* may properly issue whenever the questions of law or of fact to be ultimately determined are grave and difficult, and injury to the moving party will be immediate, certain, and great, if it is denied, while the loss or inconvenience to the opposing party will be comparatively small, if it is granted.⁴¹ The court is always disposed to grant the injunction where the denial of it would in effect be a denial of all relief, or where the denial of the injunction would at least subject the plaintiff to the risk of losing all.⁴²

City of Newton v. Lewis (C. C. A.; 1897) 25 C. C. A. 161, 79 Fed. 718: Sanborn, Circuit Judge, in approving of the action of the lower court in granting a preliminary injunction, observed: "To grant the injunction was to preserve the

³⁹ *Foster v. Ballenberg* (1890) 43 A.; 1903) 59 C. C. A. 579, 124 Fed. 821.

⁴⁰ *Jones v. Dimes* (1904) 130 Fed. (1899) 98 Fed. 166.

⁴¹ *Denver etc. R. Co. v. U. S.* (C. C. Fed. 729, 740.

⁴² *Africa v. Board etc.* (1895) 70

property of all parties in *status quo*, and prevent substantial damage to any one, whatever the final decree might be, while to refuse it was to permit the immediate destruction of the property of the electric company and the security of the appellee, to allow the infliction of irreparable loss upon them, and to render the suit and its decision useless if the final decree should be in favor of the appellee. There can be no question of the duty of the chancellor to issue an injunction under such circumstances. The controlling reason for the existence of the right to issue a preliminary injunction is that the court may thereby prevent such a change of the conditions and relations of persons and property during the litigation as may result in irremediable injury to some of the parties before their claims can be investigated and adjudicated. When the questions to be ultimately decided are serious and doubtful, the legal discretion of the judge in granting the writ should be influenced largely by the consideration that the injury to the moving party will be certain, great, and irreparable if the motion is denied, while the inconvenience and loss to the opposing party will be inconsiderable, and may well be indemnified by a proper bond, if the injunction is granted. A preliminary injunction maintaining the *status quo* may properly issue whenever the questions of law or fact to be ultimately determined in a suit are grave and difficult, and injury to the moving party will be immediate, certain, and great if it is denied, while the loss or inconvenience to the opposing party will be comparatively small and insignificant if it is granted."⁴³

A preliminary injunction will in no case be granted where it is manifest that the *status quo* will be preserved without the aid of such injunction. In such case there is no danger of any irreparable injury to the plaintiff and the court is not called upon to exercise any extraordinary power.⁴⁴

§ 2351. Case Where Injunction Determinative of Whole Controversy.

As a rule, the court of equity is averse from interfering by means of an injunction to change an existing state of affairs where the circumstances are such that its action in granting the injunction will, in practical effect, decide the whole controversy in favor of the plaintiff. For instance, if a controversy arises among the stockholders of a corporation, and a minority of the stockholders seek an injunction to prevent the majority from voting shares held by them, at an impending

⁴³ *Accord*, *Blount v. Société Anonyme du Filtre* (1892) 6 U. S. App. 335, 3 C. C. A. 455, 53 Fed. 98; *Jenson v. Norton* (1894) 29 U. S. App. 121, 12 C. C. A. 608, 64 Fed. 662; *Dooley v. Hadden* (1896) 72 Fed. 952; *Buskirk v. King* (1896) 72 Fed. 429; *Georgia v. Brailsford* (1791) 2 Dall. 402, 1 L. ed. 433; *New Memphis Gas & Light Co. v. Memphis* (1896) 72 Fed. 22, 18 C. C. A. 418; *Southern Pac. Co. v. Earl* (1897) 82 Fed. 690, 27 C. C. A. 185; *Indianapolis Gas Co. v. Indianapolis* (1897) 82 Fed. 245; *Allison v. Corson* (1898) 68 Fed. 581, 32 C. C. A. 12; *Sanitary Reduction Works v. California Reduction Co.* (1899) 94 Fed. 693; *Denver & R. G. R. Co. v. United States* (1903) 124 Fed. 156, 59 C. C. A. 579.

⁴⁴ *Miller v. Mutual etc. Ass'n* (1901) 109 Fed. 278.

stockholders' meeting, the court will not grant the injunction and thereby in effect turn the corporation over to the minority stockholders; for this would operate to give them all the benefit of a final adjudication in their favor.⁴⁵

But if the plaintiff's right is clear, the court will not be deterred from granting an injunction merely because the effect of it will be a virtual determination of the suit. This is frequently illustrated in suits for an injunction against strikers. Though the preliminary injunction would obviously break the strike and leave practically nothing else to litigate about, it will yet be granted where the acts enjoined are plainly unlawful and, if continued, would work irreparable damage. Advertence to the circumstance that such an injunction does operate to break up the strike increases the responsibility of the court in such cases and imposes on it the duty of seeing that the injunction shall not be issued except in accordance with law and right.⁴⁶

§ 2352. Injunction to Prevent Entry of Landlord.

Owing to the estoppel of a tenant to question the title of his landlord, the former will not be granted a preliminary injunction to prevent an ouster at the termination of the lease, upon any ground that tends to impeach the landlord's title. And if notice to quit has been properly given and the right of the landlord to re-enter is clear, the circumstance that the tenant will be greatly injured by the entry does not justify a preliminary injunction to postpone it. If the court can see that the tenant clearly has no case, it will not interfere to prevent his ejection.⁴⁷

§ 2353. No Injunction against Accomplished Act.

As the action of the court in granting a preliminary injunction depends, or should depend, on the situation at the time the application is considered and acted upon, the writ will not be granted where it would obviously prove a *brutum fulmen*, as for instance, where the act against which it would be directed has already been done.⁴⁸ In a case where the United States filed a bill to prevent a foreign telegraph company from landing and laying its cable on the shores of this coun-

⁴⁵ *Taylor v. Southern Pac. Co.* (1903) 122 Fed. 147, 155. *Pennsylvania R. Co.* (1903) 120 Fed. 362 (1903) 59 C. C. A. 113, 123 Fed. 33.

⁴⁶ *American Steel etc. Co. v. Wire Drawers' Union* (1898) 90 Fed. 603. ⁴⁸ *Mexican Ore Co. v. Mexican Guadalupe Min. Co.* (1891) 47 Fed. 351.

⁴⁷ *Western Union Tel. Co. v. Penn-*

try, without the consent of the government, a preliminary injunction against the operation of the service was refused, because it appeared that the cable had been landed before the motion for a preliminary injunction was heard, and nothing was shown to indicate that irreparable injury would result from its operation upon the final hearing.⁴⁹

§ 2354. No Injunction Where Defendant Has Ceased Wrongful Acts.

A preliminary injunction will not be granted unless injury is being committed or threatened. If the defendant appears already to have desisted from his wrongful act and there is no reason to suppose that the injury will be repeated, the injunction will be refused.⁵⁰ But it has been ruled that "a naked and unsupported promise" on the part of a defendant to desist from his wrongful acts is not enough to justify a refusal of the injunction.⁵¹

§ 2355. Miscellaneous Considerations Affecting Right to Injunction.

The circumstance that the United States cannot be required to give an injunction bond supplies a reason why, in suits brought in its name, the extraordinary relief by preliminary injunction should be refused in all doubtful cases, especially where the defendant would be financially hurt and embarrassed by such injunction.⁵²

The suggestion, not infrequently advanced by parties desiring to obtain an injunction, that "there is nothing in the injunction that would interfere with an honest man conducting his business unhindered by any restriction" is not enough to justify the issuance of a preliminary injunction where no clear right thereto is shown. The fact that the mere issuance of an injunction would stigmatize the defendant by indicating that he had done or threatened to do some unlawful act is an argument against issuing it.⁵³

In a suit by a stockholder to enjoin the doing of corporate acts alleged to be *ultra vires*, it has been observed that the right of the plaintiff to a preliminary injunction is prejudiced by the circumstance that he appears to have acquired his interest as a stockholder merely for the purpose of attacking the transaction in question. Such a plaintiff can insist only upon such preliminary relief as is abso-

⁴⁹ *United States v. Compagnie Francaise* (1896) 77 Fed. 495.

⁵⁰ *Home Ins. Co. v. Nobles* (1894) 63 Fed. 642.

⁵¹ *Celluloid Mfg. Co. v. Arlington Mfg. Co.* (1888) 34 Fed. 324.

Eq. Prac. Vol. II.—87,

⁵² *United States v. Jellico Mountain etc. Co.* (1890) 43 Fed. 898.

⁵³ *International Register Co. v. Recording Fare R. Co.* (C. C. A.; 1907) 80 C. C. A. 475, 151 Fed. 199.

lutely indispensable to preserve his rights. "The purchaser of a lawsuit is entitled to what he has bought."⁵⁴

The Mandatory Injunction.

§ 2356. Injunction Looks to Prevention of Future Injury.

The preliminary injunction is primarily a conservative and not a remedial instrument. Consequently it will not ordinarily be given a retroactive or restorative effect, that is, it will not be used to compel the undoing of that which has already been done. The prime function of the writ is to preserve the *status quo*; and while it may properly be used to prevent a disturbance of property, it cannot ordinarily be permitted to operate so as to require a restoration of property to the condition it was in prior to a disturbance already effected. Preservation of the *status quo* does not mean restoration to the *status quo* existing before the interference.⁵⁵ In other words, the mandatory feature will not ordinarily be ingrafted on a preliminary injunction.

Southern Pac. R. Co. v. Oakland (1893) 58 Fed. 50: The city claimed title to premises occupied by the railroad, and in assertion of its title the officials of the city entered on those premises and caused the railroad track to be partly torn up. The railroad brought suit to quiet its title and to enjoin further trespasses. The court granted a preliminary injunction against future trespasses but refused to require the city to restore the track.

§ 2357. When Injunction Not Objectionably Mandatory.

But an injunction is not technically a mandatory injunction, at least not in any objectionable sense, merely because the defendant, in order to comply with it, is bound to take some positive step or other. Thus, where the usual course of business has been improperly interrupted and an injunction is obtained to prevent the continuance of such interruption and to restore business to its usual course, the circumstance that the defendant must perform some minor positive acts in restoring affairs to their former course does not make the injunction mandatory in an objectionable sense.⁵⁶

⁵⁴ *DuPont v. Northern Pac. R. Co.* (1883) 18 Fed. 467, 21 Blatchf. 534. ⁵⁵ *Fairchild Floral Co. v. Bradbury* (1898) 87 Fed. 415. *Compare In re*
⁵⁶ *Southern Pac. R. Co. v. City of Lennon* (1897) 166 U. S. 548, 41 L. ed. 1110, 17 Sup. Ct. 658.
Oakland (1893) 58 Fed. 50. But see *Chattanooga Terminal Ry. Co. v. Felton* (1896) 69 Fed. 273, 283.

§ 2358. Power of Court to Grant Mandatory Injunction—Illustrations.

Upon principle there is no difference between the authority of the court in respect to the granting of mandatory injunctions, either final or interlocutory, and its authority in regard to the granting of purely prohibitory injunctions. The courts do indeed display hesitancy about granting mandatory injunctions, but this arises from the consciousness that, in requiring an affirmative act to be done, the court is undertaking to insist on the doing of something that it cannot always be sure will be rightly done. But wherever the exigency requires it, and the situation is such as to make the order practicable, the mandatory injunction will be granted.⁵⁷ The mandatory character of an injunction is often cloaked under the outward form of a purely prohibitory injunction;⁵⁸ and perhaps in this way alone has the mandatory injunction obtained a legal footing. However, this no longer holds, and a mandatory injunction that is affirmative on its face may be granted if necessary.

1. *Cole Silver Mining Co. v. Virginia etc. Co.* (1871) 1 Sawy. 470, 465: The plaintiff had used for many years in its mining operations a flow of water from a subterranean stream. The defendant put a tunnel through the mountain from a distant point, which tunnel came within about thirty feet directly under the spot where the plaintiff got its water. This tunnel tapped and drained the stream in question, with the result that the defendant appropriated and diverted all the water, so that the plaintiff was deprived of it. The plaintiff thereupon filed a bill to restrain the diversion, and on motion an interlocutory injunction was granted requiring the defendant to desist from continuing to divert the water. The injunction was affirmative and mandatory in respect of the fact that, before it could be complied with, it was necessary for the defendant to build a water-tight barrier across the tunnel or even to fill up the tunnel.

It was argued for the defendant that the diversion was already committed and that the court should not, by a mere interlocutory order, undertake to restore the parties to their former position. Sawyer, J., admitted that authority could be vouched for such position, but he pointed out that any unlawful interference that is, in its nature, a continuing offense can be enjoined by a restrictive order, and the circumstance that the order incidentally calls for and requires some affirmative act is no objection to it. The action of this judge was afterwards approved by Field, Circuit Justice.

⁵⁷ See *Mills v. Green* (1895) 159 U. S. 654, 40 L. ed. 294. qui res the railroad to accept the packages of the express company at the same

⁵⁸ An injunction which prohibits a railway company from charging an express company excessive rates and from thereby preventing it from carrying on business over that road, and which requires the railroad to accept the packages of the express company at the same rates as are charged to other express companies, is mandatory and affirmative in its effect though it be negative in form. *Southern Express Co. v. Memphis etc. R. Co.* (1881) 8 Fed. 790,

E. Coe v. Louisville etc. R. Co. (1880) 3 Fed. 775: The defendant railroad company had, for more than twelve years, been delivering stock on a switch at the plaintiff's stockyard, the same being connected with the railroad by gaps and pens. A new stockyard company was established in another part of the city, and the railroad entered into a contract with this new company whereby it agreed that all cattle shipped to the city and over the road should be delivered at the premises of this stockyard company and not elsewhere. This necessarily involved a discontinuance of the delivery of stock to the plaintiff at his yard as was formerly the custom. A preliminary injunction was granted requiring the company to continue delivering stock to the plaintiff at his yard. The court observed that such a mandatory preliminary injunction ought not to be granted unless the rights of the parties were free from reasonable doubt and the urgency of the case demanded it.

§ 2359. Nature of Equity Justifying Mandatory Injunction.

The equity that will justify the granting of a mandatory injunction must be much better defined and much more cogent than that which will justify the granting of a prohibitory injunction.

Vicksburg v. Waterworks Co. (1906) 202 U. S. 453, 471, 50 L. ed. 1102, 1112: A waterworks company was found to be entitled to a prohibitory injunction restraining a city from making sewer connections with a drainage course that emptied into the plaintiff's source of supply above the intake of water. But on the same facts it was held that the plaintiff was not entitled to a mandatory injunction requiring the city to extend its sewer and construct an outlet therefrom so as to discharge the sewage below the intake. The prohibitory injunction was adequate to protect the plaintiff's water from pollution; and as to the mode in which the city was to accommodate itself to the requirements of the prohibitory injunction, this matter was held to be one to be determined by the city authorities in the exercise of the official discretion vested in them.

§ 2360. Use of Mandatory Injunctions to Regulate Traffic.

The function and scope of the mandatory preliminary injunction is well illustrated in controversies that have arisen between connecting railroads. Thus, if one railroad refuses to receive and transport the cars of a connecting road, the latter road may obtain a prohibitory and mandatory injunction compelling the defendant road to discontinue its obstructive policy and to receive and transport those cars.⁵⁹

Toledo etc. R. Co. v. Pennsylvania Co. (1898) 19 L.R.A. 387, 54 Fed. 730: In this case Taft, Circuit Judge, noted that the normal condition—the *status quo*—between connecting carriers is the continuous passage of freight backward and forward between them, which each carrier has a right to enjoy without interrup-

⁵⁹ *Denver etc. R. Co. v. Atchison etc. Fed.* 516; *Chicago etc. R. Co. v. Bur. R. Co.* (1883) 15 Fed. 650; *Chicago etc. lington etc. R. Co.* (1888) 34 Fed. 481. *R. Co. v. New York etc. Co.* (1885) 24

tion. The learned judge compared this right to that which the riparian owner enjoys in regard to the continuous and uninterrupted flow of a stream of water, and he observed that preliminary mandatory injunctions had long been in vogue as a means for removing obstructions in the flow of water. "So," said he, "an obstruction to the flow of interstate freight must be preliminarily enjoined, even though it requires a mandatory injunction. The quasi-public nature of the duty to be performed by the common carriers and the irreparable character of the injury likely to result are ample grounds for this."

§ 2361. Mandatory Injunction as Incident to Prohibitory Injunction.

A court of equity will not hesitate to require affirmative action of a defendant in so far as such an order may be necessary to effect the purpose and object of the inhibitive injunction; that is, an injunction will be given a mandatory feature where this is desirable in order to carry out the prohibitive feature.⁶⁰ Similarly, a preliminary mandatory injunction may be issued as an auxiliary process to remove any obstruction to the carrying into effect of a prior prohibitory injunction in chief, the same being necessary to secure the enforcement of such previous order.⁶¹

⁶⁰ *In re Lennon* (1897) 166 U. S. 556, 41 L. ed. 1113.

⁶¹ Thus in a case where one railroad had obtained a preliminary injunction restraining another railroad from refusing to haul the plaintiff's cars, and afterwards the chief of the Brotherhood of Locomotive Engineers was made a party to the suit, a mandatory injunction was issued to enjoin him from continuing in force, or what was the same in effect, to compel him to rescind, any order to the members of the Brotherhood that would obstruct the effect of the previous prohibitory injunction. *Toledo etc. R. Co. v. Pennsylvania Co.* (1893) 19 L.R.A. 387, 54 Fed. 730, 745. A preliminary mandatory injunction transferring the possession of a mining claim, the title to which is in controversy, from one party to the other, should not be granted. *Lane v. Jordon* (C. C. A.; 1902) 116 Fed. 623, 54 C. C. A. 79.

CHAPTER LVIII.

INJUNCTIONS (*continued*).

Terms Incident to Granting or Withholding Injunction.

- § 2362. Imposition of Terms on Plaintiff—Bond.
- 2363. Requiring Additional Security.
- 2364. Terms Incident to Withholding Injunction.

Issuance and Scope of Injunction.

- 2365. Fiat for Issuance of Injunction.
- 2366. Form and Contents of Writ.
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*Terms Incident to Granting or Withholding Injunction.***§ 2362. Imposition of Terms on Plaintiff—Bond.**

The granting of an application for a preliminary injunction being a matter within the discretion of the court, it is entirely competent and proper for the court, in passing upon such application, to impose terms upon either of the parties. For instance, the court will always require the plaintiff to do equity, and he is usually required to give a bond with good security to indemnify the defendant against loss from the wrongful suing out of the writ.¹ The requirement of a bond is discretionary both as to the giving of the bond and its amount;² and if it sees fit to do so, the court can order the injunction to issue without any bond at all.³

Russell v. Farley (1881) 105 U. S. 438, 26 L. ed. 1061: The supreme court here had under discussion the subject of the power of the court of equity to impose terms upon a party in whose behalf a preliminary injunction is granted. Reference was made to the circumstance that in courts of equity in many of the states the power to impose terms was expressly sanctioned by statutes. "But," said the court, "no act of Congress or rule of this court has ever been passed or adopted on this subject. The courts of the United States, therefore, must still be governed in the matter by the general principles and usages of equity."⁴

Proceeding thereupon to expound the ground of this equitable power, the court said: "If the legal right is doubtful, either in point of law or of fact, the court is always reluctant to take a course which may result in material injury to either party; for the damage arising from the act of the court itself is *damnum absque injuria*, for which there is no redress except a decree for the costs of the suit, or, in a proper case, an action for malicious prosecution. To remedy this difficulty, the court, in the exercise of its discretion, frequently resorts to the expedient of imposing terms and conditions upon the party at whose instance it proposes to act. The power to impose such conditions is founded upon, and arises from, the discretion which the court has in such cases, to grant, or not to grant, the injunction applied for. It is a power inherent in the court, as a court of equity, and has been exercised from time immemorial."

That an injunction bond bears a date prior to the granting of the order is no objection to its validity, as it takes effect only on being filed and upon justification of the sureties.⁵

¹ *Meyers v. Block* (1887) 120 U. S. 206, 30 L. ed. 642, 7 Sup. Ct. 525; *Montana Co. v. St. Louis Min. etc. Co.* (1894) 152 U. S. 170, 38 L. ed. 400. *Briggs v. Neal* (C. C. A.; 1903) 56 C. C. A. 572, 120 Fed. 224.

² 105 U. S. 441, 26 L. ed. 1063.

³ *Hammond Lumber Co. v. Sailors'*

West v. East Coast Cedar Co. (C. C. A.; 1902) 51 C. C. A. 416, 113 Fed. 742.

Union (1906) 149 Fed. 580.

§ 2363. Requiring Additional Security.

After the sureties on an injunction bond have been accepted, the court will, on motion, require additional or different security to be given, if it is made to appear that the sureties previously accepted are not good and solvent.⁶ An injunction bond may be increased where it becomes manifest that, owing to the prolongation of the litigation, the damages covered by the bond will be greater than the amount of the original bond.⁷

By moving to dissolve an injunction, a party does not waive his right to object to the sufficiency of the sureties on the bond. The motion to justify the sureties or to require additional security may be heard simultaneously with a motion to dissolve.⁸

§ 2364. Terms Incident to Withholding Injunction.

As the court has power to impose terms on the plaintiff as a condition of the granting of the injunction, so may it impose terms on the defendant as a condition of withholding the injunction, as for instance, by requiring the defendant to give a bond or to comply with some other reasonable condition;⁹ and it may be laid down as a general principle that an injunction should always be withheld where terms can be arranged that will at once adequately protect the plaintiff and at the same time operate less prejudicially to the defendant than would the granting of an injunction.¹⁰ The circumstance that the impending or threatened injury may be adequately compensated in money is a good reason for refusing a preliminary injunction where the issuance of it would embarrass the defendant and inflict considerable loss on him. But the defendant may be required to give bond as a condition for withholding the injunction, a good case for injunction being otherwise made out.¹¹

Issuance and Scope of Injunction.

§ 2365. Fiat for Issuance of Injunction.

If the court or judge to whom an application for a preliminary injunction is made deems that a sufficient showing has been made to

⁶ Goldmark v. Kreling (1885) 25 Fed. 349.

⁷ Tampa Waterworks Co. v. City of Tampa (1903) 124 Fed. 932.

⁸ Goldmark v. Kreling (1885) 25 Fed. 359.

⁹ In a copyright suit the court was inclined to think that the plaintiff was entitled to a preliminary injunction, nevertheless the same was denied on the condition that the defendant should

give bond for the payment of such damages as might finally be recovered against him, and should also agree to

keep an account of sales. Sampson etc.

Co. v. Seaver-Radford Co. (1904) 129 Fed. 761, 773.

¹⁰ Kansas etc. R. Co. v. Payne (C. C. A.; 1892) 1 C. C. A. 183, 49 Fed. 114.

¹¹ Rainey v. Baltimore etc. R. Co. (1883) 15 Fed. 767.

justify the issuance of the writ, he thereupon grants his fiat for the injunction. This is nothing more than an order that the writ may be made and issued in conformity with the prayer of the bill or in conformity with the limitations and conditions stated in the fiat itself; and the fiat is construed with reference to the prayer and object of the bill upon which it is granted.¹² If it be compatible with the nature of the remedy to issue the writ on a condition subsequently to occur, that condition should be incorporated in the order, or appear upon the face of the process. It cannot be left at the option and control of the party obtaining the order.¹³

In granting the fiat for an injunction, the court should take care to impose such terms as will enable the writ to operate justly and to prevent any unnecessary damage being done by the use of the writ. Exceptional care should be taken in regard to limiting the operation of the writ in cases where the court sees fit to grant the fiat without requiring the plaintiff to execute a bond.¹⁴

§ 2366. Form and Contents of Writ.

The formal writ of injunction, which is issued upon the authority of the fiat, is usually drawn up by the clerk of the court in conformity with the fiat and with due reference to the case made in the bill and the prayer for injunction contained in it. But of course in important or delicate cases, the terms of the injunction should be settled by the court as in case of decrees, especially if any dispute arises as to the provisions proper to be inserted in the injunction. No particular form is requisite for the writ, it being sufficient if the defendant is given an authentic notification of the mandate he is required to obey. The writ should be sufficiently explicit on its face to apprise the defendant of what he is restrained from doing, without compelling him to resort to the bill to ascertain what the injunction means.¹⁵ But where the writ refers to the bill, and the defendant has knowledge of its contents, and the meaning of the injunction is obvious, he cannot insist that the injunction is vague and uncertain.¹⁶

§ 2367. When Issuance of Formal Writ Necessary.

As regards the necessity for the issuance of a formal writ of injunction, a distinction must be drawn between two well-defined classes of

¹² *Hamilton v. State* (1869) 32 Md. 352.

¹³ *McCormick v. Jerome* (1856) 3 Blatchf. 496.

¹⁴ *Gibson, Suits in Chan.* (2d ed.) 829.

¹⁵ *Gibson, Suits in Chan.* (2d ed.) 834.

¹⁶ See *Whipple v. Hutchinson* (1858) 4 Blatchf. 190.

cases. The first is that in which the writ of injunction comprises the effectual order and decree of the court, and is itself the evidence of such decree or order. The other is that in which the writ of injunction is only used as a vehicle by which to convey to the defendant a knowledge of the injunctive order or decree of the court already entered on the record in the cause. To illustrate: When a preliminary application is made to a judge, and he grants his usual fiat for the issuance of a preliminary injunction or restraining order, the issuance of the formal writ is absolutely necessary, for apart from the writ itself there is no injunctive order or decree that could be considered binding on the defendant. On the other hand, where a motion for an injunction *pendente lite* is brought before the court by motion in usual course, both parties being present or represented by counsel, and the court decides to grant the injunction, it has ample power to enter an interlocutory order of injunction that will be binding on the defendant from the time it is granted; for being in court, and being a party to the suit, the defendant has knowledge of all decrees and orders properly entered in the cause, and he must therefore be considered as being bound by the injunctive order. In such case the issuance of a formal writ of injunction in pursuance of the injunctive order and in conformity with its terms is not necessary. However, it is not unusual in actual practice for the writ to be issued, in such cases, as a matter of form; and this practice is not a bad one, for in the formal writ it may be convenient to define, with greater particularity than in the injunctive order, the acts that the defendant is enjoined from doing.¹⁷

§ 2368. Notice of Injunction.

Prompt notice of the granting of the injunction and of its terms should be served on the party enjoined and his attorney if they can be reached.¹⁸ However, to render a person amenable to an injunction, it is not necessary that he should be actually served with a copy of the injunctive order or with a copy of the writ. If he receives actual notice of the granting of the injunction and of its terms, this is enough, in whatever way such notice may have been given.¹⁹ But

¹⁷ The actual issuance and service of a formal writ of injunction or of a restraining order are not necessary, where the order of the court specifies the prohibited acts and a certified copy of such order is served. *Hammond Lumber Co. v. Sailors' Union* (1906) 149 Fed. 577, 580.

¹⁸ *In re Cary* (1882) 10 Fed. 622.

¹⁹ *Ex parte Lennon* (1897) 166 U. S. 548, 41 L. ed. 1110, 17 Sup. Ct. 658; *Christensen Engineering Co. v. Westinghouse Air Brake Co.* (C. C. A.; 1906) 68 C. C. A. 476, 135 Fed. 774, 777; *Pope Motor Car Co. v. Keegan* (1906) 150 Fed. 148, 151; *Ex p. Richards* (1902) 117 Fed.

those who procure an *ex parte* injunction, and make no effort to serve it upon the persons who they claim shall be bound by it, though they are easily accessible, are not entitled to proceed for contempt upon any accidental, doubtful, and disputed notice of the injunction alleged to have been conveyed indirectly through other persons.²⁰

§ 2369. Notice of Giving Bond.

If the order granting an injunction is conditioned to be effective when the plaintiff shall give bond, and such bond is subsequently given, the defendant is chargeable with notice of the giving of the bond; and if he does the prohibited act after that time, he is guilty of contempt. Notice of the giving of the bond is not necessary to bind him, unless the order should provide for such notice to be given.²¹

§ 2370. Delay of Plaintiff to Procure Writ or Serve Notice.

If the party in whose favor a fiat for an injunction is granted fails to sue out the writ and procure it to be served, or fails to cause notice to be otherwise given, within a reasonable time, he thereby abandons and waives his claim to injunctive relief; and if the issuance of the writ is afterwards procured by him, the person enjoined will not be punished for a violation of it. It has been held that the lapse of one year between the granting of the order and service of notice of the injunction is sufficient to render the writ ineffectual.²²

§ 2371. Scope of Injunction.

The order granting the injunction should be drawn with precision and with due regard to the extent of protection to which the plaintiff is entitled, without undue interference with the rights of the person who is restrained. Both parties are to be dealt with in the same spirit of fairness and impartiality.²³ Neither should be given any undue advantage over the other.

Northern Pac. R. Co. v. Spokane (1892) 52 Fed. 428, 430: The railroad had created a warehouse on a spot alleged by the city to be in a public street, and the city threatened to demolish it. There was also a controversy as to whether the premises were within the fire limits or not, and so subject to the order of the city

658; *Ulman v. Ritter* (1896) 72 Fed. 1000; *In re Feeny* (1870) Fed. Cas. No. 4,715. ²² *McCormick v. Jerome* (1856) 3 Blatchf. 486, Fed. Cas. No. 8,721.

²³ *Marble Co. v. Ripley* (1870) 10

²⁰ *In re Cary* (1882) 10 Fed. 622, 627. Wall. 339, 354, 19 L. ed. 955.

²¹ *Burr v. Kimbark* (1887) 29 Fed. 428, 430.

as to that kind of an erection. The court granted an injunction against the city as to the removal of the warehouse, but so modified the order as not to preclude the city from requiring an inspection of the plans for the erection of any new building. Said the court: "The order should be limited so as to simply preserve the *status quo*, and should not give either party any advantage by proceeding in the acquisition or alteration of property, the right to which is disputed, while the hands of the other party are tied."

An order of injunction should be sufficiently extensive to protect the right of the plaintiff that the defendant is violating. The appellate court will not modify an injunctive order, even though it trenches upon delicate ground and goes to the verge of discretion, where it is plain that no substantial right of the defendant is thereby invaded. Though the court should keep injunctions within their legitimate scope, loopholes should not be left whereby the defendant can defeat the purpose of the injunction; and where it is plain that the defendant is seeking to do this, the court will not strain conclusions to assist him.²⁴

§ 2372. Scope of Writ as Affected by Allegations of Bill.

The injunction must not be given a broader scope than the case made in the bill.²⁵ But it is not necessary that the language of the injunction or injunctive order should literally or strictly follow the language of the bill. An injunction is not too broad though it describes in general terms the acts particularly set forth in the bill as wrongful.²⁶

An injunction may be broadened upon the filing of a supplemental bill enlarging the case made in the original bill.²⁷

Against Whom Operative.

§ 2373. Defendants, Agents, and Confederates.

A preliminary injunction should be so drawn as to be operative against all persons whom it is desirable to bring within the compass of the order, and they should be either named or described in apt words. An injunction may be made to run against the defendant, his counsel, agents, and servants and all persons in privity or con-

²⁴ *Evenson v. Spaulding* (C. C. A.; 1907) 9 L.R.A.(N.S.) 904, 82 C. C. A. 203, 150 Fed. 523. ²⁶ *Economist Furnace Co. v. Wrought-Iron Range Co.* (1898) 86 Fed. 1010, 1012.

²⁵ *Hammond Elevator Co. v. Chicago* (C. C. A.; 1905) 74 C. C. A. 430, 143 Fed. 292. ²⁷ *Parkhurst v. Kinsman* (1848) Fed. Cas. No. 10,700.

federating with him.²⁸ This is the usual form of the writ of injunction to prevent waste, trespass, or the continuance of a nuisance. And a preliminary mandatory injunction will be made so to run as well as the prohibitory injunction.²⁹

United States v. Elliott (1894) 64 Fed. 27, 35: In a suit to enjoin a combination in restraint of interstate commerce that was being put into effect by strikers, a preliminary injunction was granted, which recited that it should be binding on the defendants named in the bill and also "upon such defendants whose names are not stated but who are within the terms of this order." It was further ordered that the injunction should be operative upon all persons acting in concert with the designated conspirators, and under their direction and control, and where parties were not named especially in the writ, but were found to be acting in concert with and under the direction of the alleged conspirators, and committing some act in furtherance of the conspiracy, then the marshal should serve the writ upon them, and if, after service of the writ upon them, they did any act in violation of the injunction, they would come within the terms of the order. It was insisted that this injunction was objectionable because it went against parties not named specifically in the bill and in the order. But the objection was overruled, the court saying that such an order was conformable to the usage of the equity court, and inasmuch as the injunction was not to become operative on any one until he should be served with a copy of the writ, the regularity of the order was unquestionable.

Bringing a bill against certain named defendants, "their confederates, associates, agents, and servants," does not make any others than such as are specifically named actual parties to the bill in the full sense. The purpose of specifying confederates and other associates in general terms is to enable the court to punish them for contempt, in case of a wilful violation of the injunction, or to allow them to be brought in and bound by the decree when their names are ascertained. Persons thus generally described are not technical parties.

Ex parte Richards (1902) 117 Fed. 658: During a miners' strike, the plaintiff, a colliery company, obtained an injunction against disturbances of a certain character. The bill ran against the defendants who were specifically named and their unknown confederates, agents, servants, etc., and the prayer for process ran in

²⁸ *Chattanooga Terminal Ry. Co. v. Felton* (1895) 69 Fed. 273, 285. defendant and "all other persons" has been held effective as against one having notice of the order, though no conspiracy or privity with the principal defendant appeared. *In re Lady Bryan Min. Co.* (1870) Fed. Cas. No. 7,980; *Chisolm Chambers Co. v. Iron Moulders' Union* (1906) 150 Fed. 155, 161.

²⁹ *Toledo etc. R. Co. v. Pennsylvania Co.* (1893) 19 L.R.A. 387, 54 Fed. 742.

the same form. Subsequently, certain persons were brought up for contempt as confederates, aiders, and abettors of the defendants. The residence of these individuals was such that if they had been made original parties to the suit, or if they could be considered as being actual parties under the general term "confederates," the court would have had no jurisdiction of the cause. It was held that they were not parties in this sense.

Yet for all purposes of punishing them for contempt in the violation of the injunction, such persons are treated the same as actual parties. "They are in effect parties to the cause, at least in the same situation as a named party, so far as concerns a violation of the order."³⁰

§ 2374. Injunction against Others than Parties to Suit.

Although the court of equity has ample power to extend an injunction, preliminary or final, to parties other than those actually of record, it will not exercise such power unless this course seems to be necessary. To justify such an extension of the injunction there should be some showing of a conspiracy or joint action between the defendants and the other parties, or it should appear that the defendants named represent those not named.

Scott v. Donald (1897) 165 U. S. 107, 41 L. ed. 648, 17 Sup. Ct. 262: The dispensary law of South Carolina appearing to be unconstitutional in a certain aspect, the court below granted a preliminary injunction restraining the defendants, officers of the state, from seizing and carrying away under color of that law spirituous liquors brought into the state by the plaintiff. The injunction was so framed as to extend to "all other persons claiming to act as constables, and all sheriffs, policemen, and other officers, acting or claiming to act under said dispensary act." The supreme court disapproved of this feature of the injunction and modified it accordingly. Said the court: "This is not a case where the defendants named represent those not named. Nor is there alleged any conspiracy between the parties defendant and other unknown parties. The acts complained of are tortious, and do not grow out of any common action or agreement between constables and sheriffs of the state of South Carolina."

§ 2375. New Defendants Brought in by Leave.

It is often desirable that the bill, after charging the existence of a confederacy or conspiracy between the defendants and unknown parties, should ask leave to make such individuals actual defendants when their names are discovered. The final decree can then be drawn

³⁰ *Employers' Teaming Co. v. Teamsters' Joint Council* (1906) 141 Fed. 679, 658; *Ex p. Richards* (1902) 117 Fed.

so as to reserve the right to bring in future parties and bind them by the decree at any time. This procedure is especially appropriate where the bill seeks permanent injunctive relief.³¹

§ 2376. Corporation Officer.

An injunction against a corporation usually runs against the corporation, its officers, and agents.³² But it is not necessary that the officers of a corporation should be made technical parties defendant in order to make the injunction binding on them; for if the injunction is granted, the officers are bound to respect it anyway.³³

§ 2377. Substitution of Successor in Estate.

A party who, pending the suit, succeeds to the title, office, or estate of one of the original defendants, may be substituted on motion or he may be brought in and made a party defendant by a supplemental bill. Where this is done the preliminary injunction will be extended so as to include him within its operation.³⁴

§ 2378. Effect of Injunction against Agent.

One who, being a party to the suit, is enjoined from doing a particular act cannot do that act as the servant of another person who is not enjoined. But one who, not being a party, is enjoined from doing an act as servant is not thereby disabled from doing that act when the relation of service does not exist. In other words, the restraint laid on an agent, servant, or employee, restrains him only by reason of the relation of service and not personally.³⁵

§ 2379. Liability of Party for Act of Minor Child.

A party upon whom an injunction is laid will be held liable for a violation thereof by his own minor son where it appears that the wrongful act was done by his authority express or implied; and if the boy is still under the parental control, the father will be liable if he

³¹ *Chisolm v. Caines* (1903) 121 Fed. (1902) 116 Fed. 381; *Fanshawe v. Tracy* 398. In this case it was also held that (1868) 4 Biss. 490, Fed. Cas. No. 4,643; other parties could subsequently be held *Phillips v. Detroit* (1877) 3 Flipp. 92, liable upon contempt proceedings for wilful violation of the injunction, though Fed. Cas. No. 11,101; *Hatch v. Chicago* etc. R. Co. (1868) Fed. Cas. No. 6,204.

³² *Toledo etc. R. Co. v. Pennsylvania* Co. (1893) 19 L.R.A. 387, 54 Fed. 742. ³⁴ *Prout v. Starr* (1903) 188 U. S. 537, 23 Sup. Ct. 398, 47 L. ed. 584.

³³ *Slidway v. Missouri Land etc. Co.* ³⁵ *Dadirrian v. Gullian* (1897) 79 Fed. 784.

knows about the contemplated act or conduct and fails to exert his paternal authority to prevent it.³⁶

§ 2380. Extraterritorial Operation of Personal Injunction.

An injunction can be made operative beyond the territorial jurisdiction of the court. Thus, if the party enjoined is within the jurisdiction, he is bound to obey the injunction, though it relates to the doing of some act abroad, such as the conveyance of land or the institution of a suit in a foreign court.³⁷ Since the injunction operates *in personam*, it is immaterial, in a case where personal control over the defendant is alone desired, whether the subject-matter of the suit lies within the jurisdiction or not.³⁸

Interpretation of Injunctions and Injunctive Orders.

§ 2381. Injunction Construed with Reference to Its Intent.

The terms of an injunction are to be reasonably construed with reference to manifest intent and purpose, not with too great strictness, since this might operate to defeat its object, nor with too great liberality, since this might operate with hardship on those who are called upon to obey it. A literal construction that would in effect render the injunction valueless for protective purposes will not be adopted.³⁹ What the courts strive for, in construing an injunction, is to put such an interpretation upon it as will secure obedience to the spirit of the order and obtain the desired protection without at the same time unduly harassing or annoying the party whose obedience is required.

Rodgers v. Pitt (1898) 89 Fed. 425, 429: In regard to construction and effect of injunctive orders, the court said: "Courts are always disposed to allow a fair latitude of construction as to the terms of the injunction, and in many cases only require that it should be obeyed in its spirit, so that no injury should be occasioned to the complaining party. But they are never inclined to look with any degree of indulgence on schemes which are devised to thwart their orders. Any person who has been enjoined, who undertakes to see how far he can go or what he may do without crossing the prohibited line, places himself in a dangerous condition, and is always liable to be deemed guilty of contempt; for his own judgment may be so warped by his feelings or necessities that he is liable, even unintentionally, to overstep the legal bounds."

³⁶ *Dunks v. Grey* (1890) 3 Fed. 862.

³⁹ *Ex parte Richards* (1902) 117 Fed.

³⁷ *Cole v. Cunningham* (1890) 133 U. 658, 666.

S. 116, 33 L. ed. 543.

³⁸ *Cherokee Nation v. Georgia* (1831) 5 Pet. 79, 8 L. ed. 53.

§ 2382. Construction of General Words.

An injunction must be construed with reference to the case made in the bill, and more particularly with reference to its prayer,⁴⁰ and with reference to the particular wrong it was intended to prevent. An injunction must not be given an unnatural construction either for purposes of enlargement or restriction. General words of injunction are therefore not to be given effect in their entire latitude where the bill contemplates particular relief and the prayer seeks an injunction against the particular type of injury; especially where to give effect to the broad and general terms contained in the writ would clearly transcend the particular purpose of the injunction and constitute an unreasonable restriction of the rights of the person enjoined.

1. *Conway v. Taylor* (1861) 1 Black 603, 632, 17 L. ed. 191, 202: In a suit to restrain interference with a ferry franchise, the proprietors of a particular boat were enjoined under "all or any circumstances, from transporting persons or property" between the places designated. The supreme court construed this language as enjoining the defendants from transporting persons or property between those points "in violation of the ferry rights of the plaintiff," it being the manifest purpose of the decree to protect this right. Accordingly, it was held that while this injunction prevented the defendants from running their boat as a ferry boat, it did not prevent them from otherwise transporting persons or property in the ordinary course of commercial navigation.

2. *Enoch Morgan's Sons Co. v. Gibson* (C. C. A.; 1903) 122 Fed. 420: The plaintiff obtained a decree to the effect that it was entitled to the exclusive use of the word "Sapolio" as a trade-mark in connection with a certain cleansing material; and the defendant was enjoined from using that word and the word "Sapolish" in connection with the sale of his similar goods. It was held that the injunction was not to be so construed as to prevent the defendant from using the word on his packages in order to discriminate his article from the plaintiff's and to show that the substance sold by him was not Sapolio but, as he claimed, something better.

By a parity of reasoning, if it appears that the purpose of the suit and the object of the injunction cannot be attained without construing the injunction in the full and broad sense of the terms used, it will be given this construction.

In re Chiles (1874) 22 Wall. 157, 166, 22 L. ed. 819, 822: The ownership of certain bonds and coupons had been in controversy in a suit brought to recover the possession and control of them and to quiet the title thereto. The defendant relied on a title acquired by virtue of a certain contract; but a decree was entered

⁴⁰ *City of Duluth v. Abbott* (C. C. A.; 1902) 117 Fed. 137, 55 C. C. A. 153. Eq. Prac. Vol. II.—88.

against him, and he was enjoined from setting up any claim or title to any of the bonds and coupons. The injunction was general in terms and was not limited to a prohibition against the assertion of title obtained under the particular contract. The injunction was given effect to the full extent of its terms; and accordingly it was held that the defendant violated the injunction by afterwards asserting title derived from some other source than the contract that he had set up. The bill being one to quiet title, the defendant was bound to set up in that suit any sort of interest that he might have, and the decree was therefore conclusive of the title in every aspect.

Appeal from Order Granting Injunction.

§ 2383. Statutory Right of Appeal.

An order granting a preliminary injunction is an interlocutory order, and therefore upon general principle no appeal can be taken to reverse the action of the court of first instance in granting such an order. It is, however, provided by statute that an appeal may be taken to the circuit court of appeals from any order or decree of a circuit or district court granting an injunction. Such an appeal must be taken within thirty days from the entry of the order or decree, and it is entitled to precedence in the appellate court.⁴¹

§ 2384. Suspending Injunction Pending Appeal.

Injunctions are not vacated or superseded by the mere granting or perfecting of an appeal. This applies to all injunctive orders, whether final or preliminary, and without regard to the question whether the injunction is merely in perpetuation of a former decree or is granted for the first time. It also applies to writs of error sued out upon decrees of the state court. It is true that, by equity rule 93, the judges of the equity courts are given authority, upon allowing an appeal from a final decree, to specify in the order whether the injunction shall be suspended during the appeal. If not so suspended, the injunction continues to operate with full effect until the supreme court disposes of the case.⁴² The right of suspending an injunction

⁴¹ This statute first appeared in the Douglas Park Jockey Club (1906) 78 Act of March 3, 1891, establishing the C. C. A. 199, 148 Fed. 513.

During the period between Act of Feb. 18, 1895, ch. 96 (28 Stat. L. 666) and the Act of June 6, 1900, ch. 803 (Stat. L. 660) the appeal lay from an order or decree refusing to grant the interlocutory injunction; but by the later act this privilege was taken away. ⁴² Leonard v. Ozark Land Co. (1885) 115 U. S. 465, 29 L. ed. 445; Hovey v. Grainger v.

during the pendency of an appeal from an interlocutory order granting the same is derived from the statute conferring the right of appeal. This power of control can now be exercised either by the court from which the appeal is taken or by the appellate court, or a judge thereof, during the pendency of the appeal; and the court below is allowed in its discretion to require an additional bond as a condition of the appeal.⁴³ Though the court of first instance should decide to dismiss the bill, it will yet continue the preliminary injunction pending the appeal if such course appears to be necessary to prevent irreparable injury and preserve the *status quo*.⁴⁴

As the operation of an injunction is not interfered with by the taking of an appeal, so the mere prosecution of an appeal cannot operate as an injunction when none has been granted, or where the injunction actually granted has been dissolved.⁴⁵

§ 2385. Case Presented on Appeal.

The case presented upon an appeal from an order granting a preliminary injunction is quite different from that which arises upon an appeal from a final decree granting a permanent injunction. In the former case the court is not at all concerned with the ultimate merits of the controversy; in the latter, ultimate merit is the sole question for decision.⁴⁶

§ 2386. Reviewing Discretion of Lower Court.

Upon appeal from an order granting a preliminary injunction the higher court will review the case and determine what should have been the proper course for the lower court to pursue in the premises and on the case as presented to it. The matter is to be judged from

McDonald (1883) 109 U. S. 150, 161, 27 L. ed. 888, 891; Slaughter-House Cases (1869) 10 Wall. 273, 297, 19 L. ed. 915, 922.

⁴³ See Act of April 14, 1906, ch. 1627, 34 Stat. L. 116.

The following rule is in force in the First Circuit: When an appeal from a final or an interlocutory decree in an equity suit granting or dissolving an injunction is allowed, the judge from whose decision the appeal is taken, or this court, may, in his or its discretion at the time of such allowance or afterwards, and from time to time, make an order or orders suspending or modifying the injunction during the pendency of the appeal, upon such terms as to secur-

ity, or otherwise, as he or it may from time to time consider proper for preserving the rights of the parties. No. 22 of Rules of Circuit Court of First Circuit.

⁴⁴ Cotting v. Kansas City etc. Co. (1897) 82 Fed. 850.

⁴⁵ Leonard v. Ozark Land Co. (1885) 115 U. S. 465, 29 L. ed. 445; Knox County v. Harshman (1889) 132 U. S. 14, 16, 33 L. ed. 249, 250.

⁴⁶ Adam v. Folger (C. C. A.; 1903) 56 C. C. A. 540, 120 Fed. 260; Colorado Eastern R. Co. v. Chicago etc. R. Co. (C. C. A.; 1905) 73 C. C. A. 132, 141 Fed. 898; Hammond Elevator Co. v. Board of Trade (C. C. A.; 1905) 74 C. C. A. 430, 143 Fed. 292.

the standpoint of the lower court.⁴⁷ But it is to be remembered that the act of the court of first instance in granting or refusing a preliminary injunction is a matter of discretion. Hence, this act, like all other discretionary acts, is subject to reversal only in a case where discretion has been improvidently exercised or abused. Presumptively the action of the lower court was right.⁴⁸

Vogel v. Warsing (C. C. A.; 1906) 77 C. C. A. 199, 146 Fed. 949, 953: The principle governing the appellate court in passing on appeals from interlocutory orders granting an injunction, was stated thus: "The granting or withholding of an injunction *pendente lite* ordinarily rests in the sound discretion of the court to which the application is made. It is not for this court to say whether it would have granted or withheld an injunction upon the showing which was made in the court below. We must recognize that upon that court was imposed the responsibility of the exercise of sound discretion upon the case as it was presented. Unless there has been a plain disregard of the facts or of the settled principles of equity applicable thereto, the exercise of the discretion of that court is not subject to reversal in this."

The presumption in favor of the correctness of the order of the court of first instance is, of course, only a presumption of logic and good sense. It arises from a consideration of the fact that the judiciary is composed of men of sense and legal training, and their course in passing on an application for a preliminary injunction is presum-

⁴⁷ *Kansas etc. R. Co. v. Payne* (C. C. A.; 1892) 1 C. C. A. 183, 49 Fed. 114; *Columbia Phonograph Co. (C. C. A.; 1903) 58 C. C. A. 639, 122 Fed. 623*; *Massie v. Buck* (C. C. A.; 1904) 62 C. C. A. 535, 128 Fed. 27; *Hammond Elevator Co. v. Board of Trade* (C. C. A.; 1905) 74 C. C. A. 430, 143 Fed. 292; *Denver etc. R. Co. v. U. S.* (C. C. A.; 1903) 59 C. C. A. 579, 124 Fed. 160; *Empire State-Idaho M. & D. Co. v. Bunker Hill etc. Co.* (1903) 121 Fed. 973, 58 C. C. A. 311, 316; *Shea v. Nilima* (1904) 133 Fed. 209, 66 C. C. A. 263, 270; *Chickering v. Chickering & Sons* (1903) 120 Fed. 69, 56 C. C. A. 475; *Continuous Glass Press Co. v. Schmertz Wire Glass Co.* (C. C. A.; 1907) 82 C. C. A. 587, 153 Fed. 577.

⁴⁸ *Duplex Printing Press Co. v. Campbell etc. Co.* (C. C. A.; 1895) 16 C. C. A. 220, 69 Fed. 253; *Thompson v. Nelson* (C. C. A.; 1895) 18 C. C. A. 137, 71 Fed. 339; *Bissell Carpet-Sweeper Co. v. Goshen etc. Co.* (C. C. A.; 1896) 19 C. C. A. 25, 72 Fed. 550; *Mayor etc. v. Africa* (C. C. A.; 1896) 23 C. C. A. 252, 77 Fed. 500, 511; *Garrett v. Garrett* (C. C. A.; 1896) 24 C. C. A. 173, 78 Fed. 472; *Southern Pac. Co. v. Earl* (C. C. A.; 1897) 27 C. C. A. 185, 82 Fed. 690, 692; *Carson v. Combe* (C. C. A. 1898) 29 C. C. A. 660, 86 Fed. 202; *Proctor & Gamble Co. v. Globe etc. Co.* (C. C. A.; 1899) 34 C. C. A. 405, 92 Fed. 357; *Lake Shore etc. R. Co. v. Felton* (C. C. A.; 1900) 43 C. C. A. 189, 103 Fed. 227; *Thomas G. Plant Co. v. May Co.* (1900) 44 C. C. A. 534, 105 Fed. 375; *Louisville Home Tel. Co. v. Cumberland etc. Co.* (C. C. A.; 1901) 49 C. C. A. 524, 111 Fed. 667; *Rahley v.*

During the period when an appeal lay from an order denying a preliminary injunction, the appellate court, in reviewing the action of the court of first instance in refusing to grant such relief, applied the same principles as maintain where the relief has been granted and an appeal taken from such affirmative order. *Allison v. Corson* (C. C. A.; 1898) 88 Fed. 581, 32 C. C. A. 12; *Higginson v. Chicago etc. Co.* (C. C. A.; 1900) 42 C. C. A. 254, 102 Fed. 197, 199.

ably more likely to be right than wrong. There is no legal presumption in favor of the propriety of the order such as in any sense precludes the appellate court from doing exactly what it thinks should be done.

§ 2387. Review of Injunction Granted by Court of Ancillary Jurisdiction.

An appellate court will not readily reverse an order granting or continuing an injunction made by a court exercising ancillary jurisdiction where such court in granting the injunction has merely followed the course of the court of primary jurisdiction.⁴⁹

§ 2388. Modification of Injunction by Appellate Court.

If an injunction is adapted to the state of affairs existing at the time it is granted, the order granting the same will not be reversed or modified merely because the injunction is so broad as possibly to interfere with legitimate business under different conditions in the future. If such a future contingency arises, the party has his remedy by means of an application to modify the injunction.⁵⁰ An injunction, however, that goes farther than the actual existing situation justifies, will be modified to that extent on appeal.⁵¹

§ 2389. Making of Terms by Appellate Court.

On appeal from an order granting an injunction, the appellate court may remand and declare terms upon complying with which the injunction may be allowed to stand.⁵²

⁴⁹ *United States Gramophone Co. v. Seaman* (C. C. A.; 1902) 113 Fed. 745, 51 C. C. A. 419. ⁵¹ *Colorado Eastern R. Co. v. Chicago R. Co.* (C. C. A.; 1905) 73 C. C. A. 132, 141 Fed. 898, 904.

⁵⁰ *W. G. Rogers Co. v. International Silver Co.* (C. C. A.; 1902) 55 C. C. A. 83, 118 Fed. 133; *Sperry & Hutchinson Co. v. Mechanics' etc. Co.* (1904) 128 Fed. 1,015. ⁵² *Staffords v. King* (C. C. A.; 1898) 90 Fed. 136, 32 C. C. A. 536.

CHAPTER LIX.

INJUNCTIONS (*continued*).

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Dissolution and Modification.

a. In General.

§ 2390. Power of Court to Dissolve or Modify.

The authority to grant an injunction necessarily implies an authority to dissolve; and a court that has issued a preliminary injunction has inherent power to suspend, dissolve, discharge, or modify it.¹ This power extends to the dissolution or modification of injunctions resulting from orders granted in vacation as well as to those resulting from orders granted in term time.²

§ 2391. Control of Injunction in Removal Cause.

In injunction causes removed from state courts, the federal court has the same control over the injunctive process as if the suit had originated in the federal court; and the injunction will be dissolved or continued in force, as the exigency of the situation may require.³

¹ *Barnard v. Gibson* (1849) 7 How. (1846) 1 Woodb. & M. 248; *Tucker v. 650, 658, 12 L. ed. 857, 860*; *Muller v. Carpenter* (1841) Hempst. 440.
Henry (1879) 5 Sawy. 464; *Western* ² *Adams v. Douglas County* (1868)
North Carolina R. Co. v. Drew (1877) McCahon 235, Fed. Cas. No. 52.
³ *Woods* 674; *Goldmark v. Kreling* ³ *State of Arkansas v. Kansas etc. Co.*
(1885) 25 Fed. 349; *Woodworth v. Hall* (1899) 96 Fed. 353; *Texas etc. R. Co.*

The mode of proceeding in such cases is the same as in cases where the injunction is granted by the federal court itself.⁴

§ 2392. Dissolution of Injunction as Incident of Final Decree.

An injunction may be modified or discharged by any decree inconsistent with the injunction; and it is not necessary that the decree by which the injunction is modified or discharged should expressly purport to modify or dissolve the injunction. A final decree terminates the preliminary injunction by implication, even though no mention be made of it;⁵ and of course dismissing a bill operates to dissolve the injunction granted upon the filing of the bill.⁶ After a final decree has been entered a motion to dissolve the preliminary injunction will not be entertained, as there is then nothing to dissolve.⁷

§ 2393. Injunction Waived by Supplemental Bill.

The filing of an amended or supplemental bill may operate to waive the benefit of the preliminary injunction granted under the original bill; but in order that it may have this effect, there must be something incongruous or incompatible between the matter of the amended or supplemental bill and the right to injunctive relief. A supplemental bill that aims at the more effectual enforcement of the injunction does not waive it.⁸

b. Motion to Dissolve or Modify.

§ 2394. Grounds of Motion.

Injunctions are most frequently qualified, altered, or discharged upon motion or application to that effect preferred by the party injuriously affected by the injunction. The four principal grounds of motions to dissolve are: (1) Want of jurisdiction in the court; (2) want of equity on the face of the bill; (3) that the statements in the bill on which its equity rests are fully met and overcome by the answer or by affidavits filed by the defendant; (4) that there has been a want of diligence on the part of the plaintiff in the prosecution of his suit.

v. Rust (1883) 5 McCrary 348; *Carrington v. Florida R. Co.* (1872) 9 Blatchf. 468; *Mahoney Min. Co. v. Bennett* (1877) 4 Sawy. 289.
⁴ *Coburn v. Cedar Valley etc. Co.* (1885) 25 Fed. 791.
⁵ *Buffington v. Harvey* (1877) 95 U. S. 99, 24 L. ed. 381; *Eureka etc. Co. v. Richmond etc.* (1878) 5 Sawy. 121; *Fed. Cas. No. 4,549.*
⁶ *Coleman v. Hudson River Bridge Co.* (1862) *Fed. Cas. No. 2,983.*
⁷ *Sweeney v. Hanley* (C. C. A.; 1903) 126 Fed. 97, 99.
⁸ *Fanshawe v. Tracy* (1868) 4 Biss. 490, *Fed. Cas. No. 4,643.*

An injunction may be dissolved upon a showing of irregularity in the order granting the writ, or upon a showing that the writ was improvidently granted through mistake or misapprehension on the part of the court, or when some new fact arises, or is made to appear, that makes it inequitable for the injunction to be continued in force. A motion for the modification or discharge of an injunction may be maintained either upon a sufficient showing affecting the ground upon which the injunction was originally granted or upon a showing of new matter arising subsequent to the order granting the injunction.⁹

§ 2395. Time for Making Motion.

An injunction may be dissolved or modified on motion made at any time after the granting of the fiat. As soon as the defendant has knowledge that an injunction has been issued against him, he may apply at once, without waiting until he has been served with the injunction or the subpoena.¹⁰ The defendant may move to dissolve the injunction before he has filed his answer.¹¹ Where a restraining order has been issued, the cause may be brought before the court on a motion to dissolve at the same time that it is heard on the motion for the preliminary injunction.¹²

The defendant should move to dissolve the injunction, if he thinks it irregular or oppressive, as soon as practicable, since the right to insist on the unconditional dissolution of an injunction may be lost by delay in making the motion.¹³

§ 2396. To What Judge Application Made.

A motion to discharge a restraining order or to dissolve an injunction should be made before the same judge who granted it. Another judge will not entertain a motion to dissolve an injunction based on the same facts as were shown when the injunction was granted; and even in a case where the dissolution is asked on a new showing, the

⁹ *Wm. G. Rogers Co. v. International etc. Co.* (C. C. A.; 1902) 118 Fed. 133, 55 C. C. A. 83; *Sperry & Hutchinson Co. v. Texas etc. R. Co. v. Rust* (1883) 5 McCr. Mechanics' etc. Co. (1904) 128 Fed. 1015; *Hammond Elevator Co. v. Board of Trade* (C. C. A.; 1905) 143 Fed. 292, 74 C. C. A. 430.

¹⁰ *Waffle v. Vanderheyden* (1839) 8 Paige 45.

¹¹ *Adams v. Douglas County* (1868) Fed. Cas. No. 52.

¹² *St. Louis Type Foundry v. Carter etc. Co.* (1887) 31 Fed. 524.

¹³ *Read v. Consequa* (1821) Fed. Cas. No. 11,606.

In a removal case the motion to dissolve an injunction granted in a state

court may be made as soon as the record has been filed in the federal court.

judges are loath to meddle with one another's orders, unless the necessity for immediate action is great. The same consideration is shown by the circuit judges in regard to the orders of a district judge made in the capacity of judge of the circuit court as is shown in regard to the orders of a circuit judge acting in the same capacity.¹⁴

Where the judge who granted the original injunction is dead, or where for any other reason it is impossible or impracticable to bring up the application for the dissolution of the injunction before him, the matter may, of course, be brought before another judge. But in this case it has been suggested that, when practicable, two judges should hear the motion.¹⁵

§ 2397. Notice of Motion.

Reasonable notice of a motion to dissolve, discharge, or modify an injunction must always be given to the party adversely interested or his solicitor.¹⁶ The period of three days has been considered sufficient for notice of such a motion.¹⁷

If a party who has had reasonable notice of a motion to dissolve an injunction fails to prepare himself to meet the motion, the court will not continue the hearing of the motion in order to enable him to meet it.¹⁸

§ 2398. Discretion of Court in Discharging Injunction.

On consideration of a motion to modify or dissolve a preliminary injunction, the court is governed by the same principle of discretion that is operative upon the hearing of the original application for the injunction. No inflexible rule can be laid down. Each case is to be determined on its own facts; and the matter of the continuance or dissolution of the injunction is in every case in the sound discretion of the court.¹⁹ The circumstance, that on hearing a motion for a

¹⁴ Reynolds v. Mining Co. (1888) 33 Fed. 354; Klein v. Fleetford (1888) 35 Fed. 98; Ide v. Crosby (1900) 104 Fed. 582.

¹⁵ Westerly Waterworks v. Westerly (1896) 77 Fed. 783.

¹⁶ New York v. Connecticut (1799) 4 Dall. 1, 1 L. ed. 715; Wilkins v. Jordan (1813) Fed. Cas. No. 17,865.

¹⁷ Caldwell v. Walters (1835) Fed. Cas. No. 2,305.

As to the practice in some of the earlier cases see Burford v. Ringgold (1805) Fed. Cas. No. 2,152; Stoddert v. Waters (1808) Fed. Cas. No. 13,472.

¹⁸ Coburn v. Cedar Valley etc. Co. (1885) 25 Fed. 791.

¹⁹ Buffington v. Harvey (1877) 95 U. S. 100, 24 L. ed. 382; King v. Williamson (C. C. A.; 1897) 80 Fed. 170, 25 C. C. A. 355; Tucker v. Carpenter (1841) Hempst. 440; Poor v. Carleton (1837) 3 Sumn. 70, Fed. Cas. No. 11,272; Orr v. Littlefield (1845) 1 Woodb. & M. 13; Norton v. Hood (1882) 12 Fed. 764; Nelson v. Robinson (1846) Fed. Cas. No. 10,114.

preliminary injunction, the court entered upon a consideration of the merits of the case does not make this proceeding an adjudication on the merits in such sense as to preclude the court from subsequently exercising a discretion to dissolve the same injunction.²⁰

§ 2399. Burden on Moving Party.

Though the granting of an order for the dissolution of an injunction rests entirely in the discretion of the court, the court will not ordinarily grant the motion unless good reason is shown for so doing; and the burden is on the defendant to make it appear that the motion should be granted. The granting of the preliminary injunction itself is a judicial act; and where the writ has been once granted upon a sufficient showing, it will be presumed to be proper until the contrary is made to appear.

Where the preliminary injunction is admitted to have been properly issued in the first place, an order of modification will not be granted for new matter unless the defendant shows clearly that he is entitled to such modification. The burden is decidedly on him.²¹

§ 2400. Case Made in Bill Must Be Met.

Upon a motion to dissolve an injunction the allegations of the sworn bill are to be taken as true in so far as they are not met and denied by the answer²² or in other proofs produced by the defendant. Affidavits that only partially meet the case made in the bill are not sufficient to justify a dissolution of a preliminary injunction.²³ A motion to dissolve will not be allowed where the only pleading or document submitted to the court is the bill itself, which states a good cause of action and shows a *prima facie* ground for the injunction.²⁴

§ 2401. Scope of Inquiry on Motion to Modify.

In passing on a motion to modify an injunction, the court will not go into an examination of a collateral matter not necessary to be decided in connection with the injunction. In a case where a preliminary injunction had been granted to restrain the infringement of a patent, the defendant applied for a modification of the injunction

²⁰ *Westerly Waterworks v. Town of Westerly* (1896) 77 Fed. 783.

²¹ *Sperry etc. Co. v. Mechanics' Clothing Co.* (1904) 128 Fed. 1015.

²² *Young v. Grundy* (1810) 6 Cranch 51, 3 L. ed. 149.

²³ *Gulf Bag Co. v. Suttner* (1903) 124 Fed. 467.

²⁴ *Lyster v. Stickney* (1882) 12 Fed. 609.

For illustration of conditions that will not warrant the dissolution of a prelimi-

so as to make it declare in terms that a new article put forth by him was not obnoxious to the injunction; but the court refused to grant the modification, for in order to do so, it would have been necessary to determine whether this new article constituted an infringement. The proper course was for the defendant to sell the article, if he saw fit to do so, and run the risk of being brought up upon contempt proceedings.²⁵

§ 2402. Proofs Available on Motion to Dissolve.

At the hearing of the motion, the defendant may avail himself of his answer and, under the present practice, of any affidavits, depositions, or documents, that he may see fit to file in support of his answer. In order that the answer may serve the purpose of procuring the dissolution of an injunction it should be under oath; and this, even though the oath to the answer is expressly waived in the bill. The plaintiff, on the other hand, in opposing the motion to dissolve, may avail himself of the allegations of his sworn bill and, under the present practice, of such affidavits as he may introduce in support of his bill and in opposition to the proofs of the defendant.

§ 2403. Considerations Justifying Dissolution of Injunction.

An injunction will usually be dissolved on such a showing of facts as would have prevented the issuance of the injunction in the first instance, if those facts had then been presented.²⁶ For instance, an injunction will be dissolved when the court can perceive that nothing beneficial to the plaintiff can result from its continuance;²⁷ or where, for any reason, it is manifest that the bill must in the end be dismissed, as for the absence of a necessary party.²⁸ An injunction will be modified or dissolved where the party against whom it operates will thereby be relieved from inconvenience and loss, without jeopardizing the just rights of the plaintiff.²⁹

A preliminary injunction granted on a bill filed to preserve the *status quo* pending an action at law should be dissolved whenever

nary injunction in a labor dispute case, *see* *Gulf Bag Co. v. Suttner* (1903) 124 Fed. 467; *Coeur d'Alene etc. Co. v. Miners' Union* (1892) 51 Fed. 260, 19 L. R.A. 382; *Edison Electric Light Co. v. Universal Light Co.* (1894) 64 Fed. 229.

²⁶ *Cary v. Domestic Spring-Bed Co.* (1886) 26 Fed. 38.

²⁷ *In re Jackson* (1881) 9 Fed. 493.

²⁸ *Eldred v. American Palace-Car Co.* (C. C. A.; 1900) 105 Fed. 457, 44 C. C. A. 554.

²⁹ *Denver etc. R. Co. v. U. S.* (C. C. A.; 1903) 124 Fed. 156, 161, 59 C. C. A. 579.

²⁵ *Texas etc. Co. v. Kuteman* (C. C. A.; 1892) 54 Fed. 547, 4 C. C. A. 503.

it is made to appear that the defendant in the injunction has been successful in the action at law.³⁰

§ 2404. Want of Equity—Want of Jurisdiction.

Want of equity and, *a fortiori*, want of essential jurisdiction are always good grounds for dissolving an injunction;³¹ and an injunction should always be dissolved at once when the court is brought to see that its jurisdiction has been improperly and collusively invoked. Even though the cause be not actually dismissed, but is retained so that the question of jurisdiction may be formally and more fully tested, the preliminary injunction should be dissolved.³²

§ 2405. Cause Not of Equitable Cognizance.

If a court of equity, having granted a preliminary injunction, finds that the suit is not of equitable cognizance it should dismiss the suit in so far as it seeks substantive relief; but, if desirable, the injunction may be continued until the plaintiff can institute his suit at law. In other words, a bill for injunction and relief may be retained for the purposes of injunction so far as this is necessary as an auxiliary to the suit at law, though equity has not jurisdiction as to the relief.³³

§ 2406. Laches in Prosecution of Suit—Waiver of Injunctive Relief.

Culpable and unjustifiable delay in the prosecution of a suit is sufficient ground for dissolving an injunction. But if the delay results from necessity or is not chargeable to the fault of the plaintiff, it is otherwise.³⁴ While a preliminary injunction might be dissolved on a showing that the plaintiff has waived the delinquency on which the claim to injunctive relief was based, the waiver must be unambiguous and must go to the whole extent of the matters complained of as wrongful.³⁵

³⁰ *King v. Williamson* (C. C. A.; 1897) 80 Fed. 170, 25 C. C. A. 355. Compare *Fletcher v. New Orleans etc. Co.* (1884) 20 Fed. 345.

³¹ *Adams v. Douglas County* (1868) (1827) Fed. Cas. No. 7,758; *McLean* Fed. Cas. No. 52; *Kidwell v. Masterson* (1901) 113 Fed. 106. See *Hagan v. Blindell* (C. C. A.; 1893) 56 Fed. 696, 6 C. C. A. 86.

³² *Industrial etc. Co. v. Electrical Supply Co.* (C. C. A.; 1893) 58 Fed. 732, 7 C. C. A. 471.

³³ *Horsburg v. Baker* (1828) 1 Pet. 232, 7 L. ed. 125.

³⁴ *Parker v. Winnipiseogee Lake Cotton etc. Co.* (1862) 2 Black 552, 17 L. ed. 337; *Schermehorn v. L'Espenasse* (1796) 2 Dall. 360, 1 L. ed. 415, Fed. Cas. No. 12,454; *Bradley v. Reed* (1804) Fed. Cas. No. 1,785; *Read v. Consequa* (1821) Fed. Cas. No. 11,606.

³⁵ *Lowenfeld v. Curtis* (1896) 72 Fed. 105.

§ 2407. Injunction Dissolved Where Answer Meets Case Made in Bill.

Where an application for the dissolution of an injunction comes on for hearing after the defendant has filed his answer, it becomes a question of importance to determine the weight that should be attributed to the answer. Upon this point it has long been an established rule that a preliminary injunction will be dissolved, the application being heard upon bill and answer alone, where the answer denies and fully meets all the equities of the bill.³⁶ This rule has resulted from the fact that the responsive answer could, under the practice of the English chancery, be met and overcome at the final hearing only by the testimony of two witnesses or of one witness and corroborating circumstances. The same principle was applied upon the hearing of motions for the granting or dissolution of an injunction; and inasmuch as the plaintiff was not allowed, under the English practice, to file affidavits to contradict the answer, it necessarily followed that if the answer fully met the case made in the bill, the injunction had to be dissolved, the oath of the plaintiff to the bill not being sufficient of itself to overcome the oath of the defendant to the answer.

§ 2408. Limitations of This Rule.

But in order that this rule may apply, it is necessary that the answer should be in every respect sufficient both in law and fact. For instance, to justify a dissolution on the coming in of an answer, the denials of the answer must be specific and must be directed to the material facts on which the injunction is based.³⁷ If the answer fails fully to meet the allegations and the equity of the bill, the preliminary injunction will not be dissolved.³⁸ An answer is ineffectual to obtain the dissolution of a preliminary injunction where it formally denies the equities of the bill but fails to deny the facts on which those equities rest.³⁹

³⁶ *Coburn v. Cedar Valley Land etc. Co.* (1885) 25 Fed. 791; *Sioux City etc. R. Co. v. Chicago etc. R. Co.* (1886) 27 Fed. 770; *Brammer v. Jones* (1867) 2 Bond 100; *U. S. v. Parrott* (1858) 1 McAll. 271; *Northern Pac. R. Co. v. Burlington etc. R. Co.* (1880) 2 McCrary 203; *Nelson v. Robinson* (1853) Hempst. 464.

Although an answer of a corporation under a corporate seal is not entitled to the weight as evidence which attaches to a sworn answer, nevertheless such an

answer when it meets and denies the equities of the bill is sufficient to prevent the granting of an injunction or even to justify an order dissolving it. *Haight v. Morris Aqueduct* (1826) 4 Wash. C. C. 601, Fed. Cas. No. 5,902.

³⁷ *Carter v. Carlisle* (1846) Fed. Cas. No. 2,474; *Nelson v. Robinson* (1846) Fed. Cas. No. 10,114.

³⁸ *Northern Pac. R. Co. v. Barnesville etc. Co.* (1880) 4 Fed. 298.

³⁹ *Ford v. Taylor* (1905) 140 Fed. 356.

§ 2409. Denials on Information—Irrresponsive Averments.

Denials based merely on information and belief are insufficient to obtain a dissolution as against the direct charges of a bill based upon personal knowledge.⁴⁰ A denial of a mere conclusion is not enough;⁴¹ and the same is true of irresponsive averments.⁴² A temporary injunction will not be dissolved upon an answer admitting the material equities of the bill and setting up new matter in avoidance. Thus, in a suit to cancel trust bonds as having been issued by fraud, if the defendant sets up in his answer that he is an innocent purchaser, the preliminary injunction will not be disturbed prior to the final hearing.⁴³

§ 2410. When General Rule Applicable in Federal Courts.

The rule requiring the dissolution of an injunction upon the filing of an answer that fully meets the equities of the bill is applicable in the present practice of the federal courts in all cases where the motion is heard on bill and answer alone; and it is immaterial whether the bill waives the answer under oath or not. In the case where the oath is not waived in the bill, the rule is clearly applicable, because it has never been abolished; and in the case where the oath is waived in the bill, the answer is entitled, upon such motion, to the same weight as if the oath had not been waived.⁴⁴

§ 2411. Admission of Affidavits to Contradict Answer.

Under the present practice of the federal court, the rule we have just been considering does not have as frequent application as formerly, for it applies only where the motion is heard on bill and answer, and under the present practice affidavits are generally admissible to contradict the answer. As a consequence applications for the granting or dissolution of an injunction are seldom heard on bill and answer alone. The discussion contained in the following case is

⁴⁰ *Cole Silver Min. Co. v. Virginia* new matter may sometimes avail as be-
etc. Co. (1871) Fed. Cas. No. 2,990; ing equivalent to an affidavit. *United*
Poor v. Carleton (1837) Fed. Cas. No. *States v. Parrott* (1858) Fed. Cas. No.
11,272; *Middleburger v. Stanton* (1860) 15,998.
Fed. Cas. No. 9,676.

⁴¹ *United States v. Carlisle* (1871) by which the plaintiff is permitted to
Fed. Cas. No. 14,724. waive the defendant's oath, contains an

⁴² *Robinson v. Cathcart* (1825) Fed. express reservation to the effect that
Cas. No. 11,946. when the answer is used on a motion to

⁴³ *Pere Marquette R. Co. v. Bradford* grant or dissolve an injunction, it may
(1906) 149 Fed. 492, 497. be verified and used as an affidavit,

But unresponsive averments setting up "with the same effect as heretofore."

of value, because it indicates the breaking away of our practice from the strict rule of the English chancery which prohibited the use of affidavits to contradict the answer.

Poor v. Carleton (1837) 3 Sumn. 70, Fed. Cas. No. 11,272: The conclusions reached by Judge Story in regard to the state of the practice at the time this opinion was written may be stated in the following propositions:

(1) There is the general rule to the effect that if the answer denies all the allegations of the bill and fully meets the equities of the bill the injunction will usually be dissolved.

(2) But before the answer will be allowed thus to operate, it must be responsive and must be based on personal knowledge. Mere general denials based on ignorance or hearsay and made merely to settle the issues are not enough. The basis of this proposition was expressed by Judge Story thus: "The ground of the practice of dissolving an injunction upon a full denial, by the answer, of the material facts is, that in such a case the court gives entire credit to the answer, upon the common rule in equity, that it is to prevail, if responsive to the charges of the bill, until it is overcome by the testimony of two witnesses, or of one and other stringent corroborative circumstances. But it would certainly be an evasion of the principle of the rule, if we were to say that a mere naked denial by a party who had no personal knowledge of any of the material facts were to receive the same credit as if the denial were by a party having an actual knowledge of them."

(3) Furthermore, as regards the application of the general rule, a distinction is to be observed between applications for the dissolution of common injunctions and special injunctions. In cases of common injunctions (incident to suits to stay proceedings at law), the general rule may be safely applied with rigor. Hence in this class of cases it is said to be of course to dissolve the injunction upon an answer denying the whole merits of the bill.

(4) But with regard to special injunctions—and practically all injunctions are now special—a less arbitrary rule is applied, and the dissolution of the injunction is not a matter of course upon the coming in of the answer even though the denials be full and explicit. Said Story, J.: "In cases of special injunctions, if the whole merits are satisfactorily denied by the answer, the injunction is ordinarily dissolved. But there are exceptions to the doctrine, and these, for the most part, are fairly resolvable into the principle of irreparable mischief; such as cases of asserted waste, or of asserted mismanagement in partnership concerns, or of asserted violations of copyrights, or of patent rights. In cases of this sort, the court will look to the whole circumstances, and will continue or dissolve the injunction in the exercise of a sound discretion."

(5) Inasmuch as the court is free to use a sound judicial discretion in regard to the dissolution of the special injunction after answer, it follows that the plaintiff may introduce affidavits to contradict the answer, "not indeed to all points, but to many points." And wherever the plaintiff is allowed to introduce affidavits, the defendants may introduce counter-affidavits to the same points, "for otherwise they might be compromised by statements which they would have no opportunity to answer."

§ 2412. Introduction of Affidavits Opens Whole Matter.

The result of this more liberal practice is that, in every case where affidavits are used against the answer, the question of dissolving the injunction is remitted entirely to the sound discretion of the court; and the mere fact that the answer denies all the equities of the bill is not of itself enough to entitle the defendant to a dissolution of the injunction.⁴⁵ For instance, if the case be one turning upon a question of fraud, and this is put in issue by the answer, the court will be slow to dissolve an injunction upon the denials of the answer, even when supported by affidavits, especially where the fraud depends upon inferences to be drawn either from established facts or from facts about which there is conflict upon all the proof before the court.⁴⁶ But if, in ordinary cases, the answer fully meets the allegations of the bill, the preliminary injunction will be dissolved, unless the plaintiff's affidavits are sufficient to overturn the answer.⁴⁷

§ 2413. Imposition of Equitable Terms.

Upon disposing of a motion for the dissolution or modification of a preliminary injunction, the court may impose terms on the defendant as a condition of granting the order for the dissolution or modification of the injunction; as for instance by requiring him to give bond⁴⁸ or to comply with some other equitable condition. On dissolving an injunction against the cutting and removal of timber pending the appeal in a cause where the title to land was in dispute, the court required the defendant to give bond to cover such damages as might be recovered against him and also required him to account to the court from time to time as to the amount of timber taken.⁴⁹

Upon refusing to dissolve a temporary injunction, the court will make orders for the plaintiff to speed the cause, if it appears that the defendant may be unduly prejudiced by delay.⁵⁰

⁴⁵ *Blount v. Société Anonyme etc.* in the bill, but the result would be the same if it had been waived. *Pasteur* (1892) 53 Fed. 98, 3 C. C. A. 455, 457; *Duplex Printing Co. v. Campbell Printing Press Co.* (1895) 69 Fed. 250, 16 C. C. A. 220.

⁴⁶ *Pere Marquette R. Co. v. Bradford* (1906) 149 Fed. 492, 498. ⁴⁸ *Norton v. Eagle Automatic Can Co.* (1894) 61 Fed. 293, 294; *Comly v. Buchanan* (1897) 81 Fed. 58; *Kilgore v. Norman* (1902) 119 Fed. 1006.

⁴⁷ See *Ford v. Taylor* (1905) 140 Fed. 356 (1905) 137 Fed. 149. In this case the answer under oath was not waived. ⁴⁹ *Wood v. Braxton* (1892) 54 Fed. 1005.

⁵⁰ *Pere Marquette R. Co. v. Bradford* (1906) 149 Fed. 492, 499, *Eq. Prac.* Vol. II.—89.

§ 2414. Effect of Refusal to Dissolve Injunction.

If a district judge sitting as a court of equity grants a preliminary injunction at one term and at the next term the same judge again sitting in the same capacity refuses to dissolve the preliminary injunction, this operates by implication to continue the injunction in force.⁵¹

§ 2415. Modification of Injunction as Affecting Liability on Bond.

When an injunction is modified the defendant should always insist that the proceedings be so managed that he may not be wholly deprived of the protection of a bond, supposing one to have been originally given. The difficulty here arises from the fact that a modification of the injunction changes the extent of the liability of the sureties and hence may release them. A safe way to proceed would be this: Let us suppose A to have obtained an injunction against B and to have given a bond with sureties to answer for any damage that may be done to B in the event the injunction turns out to have been wrongfully obtained. B afterwards applies to the court for a modification of the injunction and the court determines that this application should be granted. Thereupon, in order fully to protect B, the court enters a decree to the effect that the injunction previously granted is abrogated and dissolved, but that the same may be continued in force, as modified, upon condition that the plaintiff give a new or additional bond, the same sureties of course being eligible on this as on the previous bond. Substantially the same object can be accomplished by granting the modification and entering an order *nisi* to the effect that the injunction be vacated and annulled if the plaintiff fails to give a new bond.

Tyler Min. Co. v. Last Chance Min. Co. (C. C. A.; 1898) 90 Fed. 15, 32 C. C. A. 498: Upon the granting of an injunction against the operation of a mine by the defendants and a removal of ore, a bond was given by the direction of the court. Subsequently the injunction order was so modified by the court as to permit the resumption of the work under certain specified conditions. No new or additional bond was required. It was held that the modification of the injunction released the sureties on the bond from all liability for damages thereafter resulting to the defendant from the continuance of the injunction and that the only damages that could be recovered on the bond were such as accrued after the bond was given and prior to the modification of the injunction.

⁵¹ *Industrial & Min. Guaranty Co. v. Judges of Circuit Court* (1827) 12 Electrical Supply Co. (C. C. A.; 1893) Wheat. 561, 6 L. ed. 729. 58 Fed. 732, 7 C. C. A. 471. See Parker

§ 2416. Order Maintaining Injunction Cures Prior Irregularity.

If an injunction is irregular on account of having been prematurely granted, and the defendant then moves to dissolve it but the court refuses to do so, the order refusing a dissolution will operate to cure the irregularity in the original order. Having at all times a discretion in regard to the matter of the maintenance or dissolution of the injunction, a refusal to dissolve is equivalent to the promulgation of a new order.⁵²

§ 2417. Reinstatement of Injunction.

After a preliminary injunction has been dissolved, it may be restored by proper application, but there should, of course, be a showing of manifest mistake on the part of the court or new facts should be shown by affidavits, which make the restoration of the injunction desirable and necessary.⁵³ Where an injunction is dissolved for insufficiency of the sureties on the bond, the court may subsequently reinstate the injunction upon the giving of sufficient security.⁵⁴

§ 2418. Dismissal Where Injunctive Relief Impossible.

When, in a suit for an injunction, the granting of injunctive relief becomes impossible because of some circumstance occurring after the suit is brought, the bill will be dismissed, and it cannot be retained for the granting of other relief under the general prayer when other necessary parties are not before the court.⁵⁵

Proceedings on Injunction Bond.

§ 2419. Bond as Prerequisite to Recovery of Damages.

No damages are recoverable for the wrongful suing out of an injunction unless a bond has been exacted by the court granting the injunction;⁵⁶ though if it appears that the injunction was maliciously sued out without any just foundation whatever, damages might be recovered in a proper case.⁵⁷

⁵² *Universal etc. Trust Co. v. Stoneburner* (C. C. A.; 1902) 113 Fed. 251, 51 C. C. A. 208.

⁵³ *Edison Electric Light Co. v. Buckeye etc. Co.* (1894) 64 Fed. 225.

⁵⁴ *Goldmark v. Kreling* (1885) 25 Fed. 349.

⁵⁵ *Bonner v. Terre Haute etc. R. Co.* (C. C. A.; 1907) 151 Fed. 985, 81 C. C. A. 476.

⁵⁶ *Scheck v. Kelly* (1899) 95 Fed. 941.

⁵⁷ And if a bond is given, damages for the malicious prosecution may be recovered in excess of the penalty of the bond against the principal and such sureties as deliberately participated in the plaintiff's malicious design. *Terry v. Robbins* (1903) 122 Fed. 725.

§ 2420. Proceedings on Bond.

As to the mode in which the party who is protected by an injunction bond may proceed to recover the damages covered by the bond and incurred by him as a result of the wrongful suing out of the injunction, there has been some diversity of opinion, and the practice has not been uniform. If there be any statute or specific rule of the court, or indeed a provision of the bond itself, providing for a particular method of procedure for the ascertainment of the damages, this would be controlling. But in the common case, where the condition of the bond is simply that the party shall pay such damages as the other shall incur from the wrongful suing out of the writ, and where there is no specific statute or rule pointing out the method to be followed, a question has arisen whether the court of equity itself should assess the damages as an incident to the proceedings in the injunction suit, or whether, on the other hand, the party may not be required to bring a new suit on the bond in a court of law. In a considered *dictum* on this point, the supreme court declared, in 1851, that the remedy on the bond is exclusively at law,⁵⁸ and this suggestion has sometimes been acted on.⁵⁹

§ 2421. Present Practice in Federal Courts.

But at a later day, the supreme court receded from its former position and stated that in a case of this kind it is within the discretion of the court of equity itself to assess the damages on the bond, referring the cause to a master for that purpose, if need be; or if the court sees fit, it may remit the party to his action at law on the bond.⁶⁰ The English court of chancery has long been accustomed to have the damages assessed upon the bond, under its own direction; and this is decidedly a better practice than that which compels the party to go into another forum.⁶¹ It has been said that only in exceptional cases should the cause be even sent before a jury.⁶²

⁵⁸ *Bein v. Heath* (1851) 12 How. 168, 179, 13 L. ed. 939, 944.

⁵⁹ *Merryfield v. Jones* (1855) 2 Curt. C. C. 306.

⁶⁰ *Cimotti Unhairing Co. v. American Fur Refining Co.* (1908) 158 Fed. 171.

In *Russell v. Farley* (1881) 105 U. S. 445, 26 L. ed. 1064, Mr. Justice Bradley, in explaining the basis of the authority of the court to assess the damages incurred under the bond, said: "The imposition of terms and conditions upon the parties before the court is an incident to its jurisdiction over the case;

and having possession of the principal case, it is fitting that it should have power to dispose of the incidents arising therein, and thus do complete justice, and put an end to further litigation. . . . It is an inherent power."

⁶¹ *West v. East Coast Cedar Co.* (C. C. A.; 1902) 51 C. C. A. 416, 113 Fed. 742; *Lea v. Deakin* (1882) 13 Fed. 514. Compare *Deakin v. Stanton* (1879) 3 Fed. 435.

⁶² *Coosaw Min. Co. v. Farmers' Min. Co.* (1892) 51 Fed. 107.

§ 2422. By What Law Liability Determined.

An injunction bond given in an equity cause pending in a federal court is to be construed in conformity with the principles of law applicable thereto, as determined by the supreme court. This rule applies as well where an independent action is brought on the bond in a state court as where the liability is to be determined by the court granting the injunction.⁶³

§ 2423. Federal Question.

An injunction bond given under the order of a federal court of equity is a bond executed in and by virtue of an authority exercised under the laws of the United States. Consequently the matter of liability on such a bond is a federal question, and the supreme court of the United States has the power to review the action of a state court in determining it.⁶⁴

§ 2424. Retrospective and Prospective Obligation of Bond.

Whether the injunction bond given under an order of the court after the suit is in progress covers only such damage as is incurred after the bond is given or whether, on the other hand, it covers all damage incurred by reason of the injunction before as well as after the giving of the bond, is a matter to be determined from the terms of the order and the bond itself construed together. The court can make the bond either prospective only or effective from the beginning. Undoubtedly the surety cannot be held beyond the terms or legal effect of his engagement; and when his contract clearly has reference to a matter contemplated as arising in the future, it is to be interpreted prospectively and not retrospectively. But if the subject of guaranty is, in whole or in part, a past transaction, and the language of the engagement is broad enough to cover the past liability, it will be so construed.

Meyers v. Block (1887) 120 U. S. 206, 30 L. ed. 642, 7 Sup. Ct. 525: The order for the injunction bond was that the plaintiff should give security "to save the parties harmless from the effects of said injunction." The condition of the bond was to pay "all such damages as he [the obligee] may recover against us in case it should be decided that the said writ of injunction was wrongfully issued." It

⁶³ *Tullock v. Mulvane* (1902) 184 U. S. 497, 46 L. ed. 657; *Leslie v. Brown* (C. S. 497, 46 L. ed. 657, 22 Sup. Ct. 372. C. A.; 1898) 32 C. C. A. 556, 90 Fed.

⁶⁴ *Tullock v. Mulvane* (1902) 184 U. 171.

was held that this bond covered all the damage resulting from the injunction prior to as well as subsequent to the giving of the bond.⁶⁵

§ 2425. Elements of Recoverable Damage.

Damages incurred by the defendant in an injunction suit by reason of counsel fees, solicitor's fees, or attorney's fees expended in defending the suit, cannot be recovered in the action or proceeding upon the bond.⁶⁶ But the plaintiff may recover for time lost during the period of the injunction, and for proper expenses incurred in securing witnesses for the purpose of resisting the injunction and for the purpose of getting it set aside.⁶⁷

Purely conjectural damages will not be allowed for the wrongful suing out of an injunction. Speculative profits that might have been earned by mining operations, if they had not been enjoined, are of this sort.⁶⁸

§ 2426. Damage Incident to Delay of Suit.

If the hearing in an injunction suit is unduly delayed by improper conduct on the part of the defendant, the latter, in a suit on the injunction bond, cannot recover damage that has resulted from the delay chargeable to himself. But where the delay in the trial of the suit appears to be equally chargeable to the negligence of the plaintiff, the consideration just mentioned is not to be given weight.⁶⁹

⁶⁵ An obligation of an injunction bond was conditioned to "abide the decision which shall be made thereon [i. e., in the original suit], and pay all sums of money, damages, and costs, that shall be adjudged against them, if said injunction shall be dissolved." Said injunction was dissolved and the bill dismissed. It was held that this bond did not cover the amount of the original judgment and its costs, nor the attorney's fee. *Browning v. Porter* (1881) 12 Fed. 460.

⁶⁶ *Missouri etc. R. Co. v. Elliott* (1902) 184 U. S. 530, 46 L. ed. 673, 22 Sup. Ct. 446; *Tullock v. Mulvane* (1902) 184 U. S. 497, 46 L. ed. 637, 22 Sup. Ct. 372; *Arcambel v. Wiseman* (1796) 3 Dall. 306, 1 L. ed. 613; *Oelrichs v. Spain* (1872) 15 Wall. 211, 21 L. ed. 43; *Sullivan v. Cartier* (C. C. A.; 1906) 77 C. C. A. 448, 147 Fed. 222. In *Lindberg v. Howard* (1906) 77 C. C. A. 23, 146 Fed. 467, it was held that this rule must be applied in the courts of the Territory of Alaska.

⁶⁷ *Sullivan v. Cartier* (C. C. A.; 1906) 77 C. C. A. 448, 147 Fed. 222.

As to the elements of damage that may and may not properly be taken into consideration in assessing damages on an injunction bond, see *Lehman v. McQuown* (1887) 31 Fed. 138; *Allen v. Jones* (1897) 79 Fed. 698; *Jones v. Allen* (C. C. A.; 1898) 29 C. C. A. 318, 85 Fed. 523; *Swift v. Kortrecht* (C. C. A.; 1902) 112 Fed. 709, 50 C. C. A. 429; *Hays v. Fidelity etc. Co.* (C. C. A.; 1902) 112 Fed. 872, 50 C. C. A. 569.

⁶⁸ *Coosaw Min. Co. v. Carolina Min. Co.* (1896) 75 Fed. 860.

⁶⁹ *Jones v. Allen* (C. C. A.; 1898) 85 Fed. 523, 29 C. C. A. 318.

2427. No Recovery for Damages Not Specified in Declaration.

In an action upon an injunction bond, if the plaintiff specifies certain heads or sorts of damage as the ground of his suit, the recovery must be limited to such items as fall under those heads.⁷⁰

§ 2428. Power of Court to Remit Liability on Bond.

We have elsewhere seen that the court of equity has inherent power, in the exercise of its discretion, to impose terms upon either or both of the parties as a condition of the granting or dissolution of an injunction.⁷¹ From this principle of the inherent power of the court to impose terms, there is deduced a corollary to the effect that the court has complete control over those terms and may mitigate or refuse to enforce them, if in the further exercise of its discretion it sees fit to do so. That which can bind can unbind, and "the power to impose a condition implies the power to relieve from it."

Russell v. Farley (1881) 105 U. S. 442, 26 L. ed. 1063: "If, for example," says the supreme court, "it is deemed proper, upon an application for an injunction, to require, as a condition of granting or withholding it, that a sum of money should be paid into court, or that a deed or other document should be deposited with the register, and the developments of the case are afterwards such as to make it manifestly unjust to retain the fund or document and deprive the owner of its use, the court assuredly has the power (though, undoubtedly, to be exercised with caution) to order it to be delivered out to the party. When the pledge is no longer required for the purposes of justice, the court must have the power to release it, and leave the parties to the ordinary remedies given by the law to litigants *inter sese*. . . . On general principles the same reason applies where, instead of a pledge of money or property, a party is required to give bond to answer the damage which the adverse party may sustain by the action of the court. In the course of the cause, or at the final hearing, it may manifestly appear that such an extraordinary security ought not to be retained as a basis of further litigation between the parties; that the suit has been fairly and honestly pursued or defended by the party who was required to enter into the undertaking, and that it would be inequitable to subject him to any other liability than that which the law imposes in ordinary cases. In such a case it would be a perversion, rather than a furtherance, of justice to deny to the court the power to supersede the stipulation imposed."

§ 2429. Remission of Liability Discretionary.

It follows that the mere fact that an injunction has been dissolved does not necessitate the giving of damages for the wrongful suing out

⁷⁰ *Sullivan v. Cartier* (C. C. A.; 1906) 77 C. C. A. 448, 147 Fed. 222.

⁷¹ See, *ante*, §§ 2362-2364.

of the injunction. The court may, in its discretion, refuse to give damages if there was reasonable ground for suing out the injunction, and if appears to the court that its process was not improperly used.⁷³ The action of the court, in deciding to relieve a party from the obligation of a bond, on the ground that the situation appears to be one where damages should not be given, is subject to review on appeal; but the matter is one bordering so closely upon pure discretion that the appellate court will not reverse except for very manifest error.⁷³

§ 2430. Surety Must Have Day in Court.

If the court of equity which has exacted an injunction bond undertakes to enforce the same and award damages for the wrongful suing out of the injunction, the sureties on the bond must be brought in and allowed their day in court, at least in all cases where the proceeding involves the determination and assessment of unliquidated damages and where the amount of the recovery on the bond is not certain.⁷⁴ If the sureties be not so brought in, the recovery must be against the principal alone.⁷⁵

§ 2431. Estoppel of Surety.

The law and facts of the case as settled by the court in which the injunction bond is given are conclusive on the sureties when sued on the bond. They are not permitted to go behind the decree and question its propriety. For instance, they cannot set up the defense that the agreement on which the decree was founded was illegal.⁷⁶

§ 2432. Surety's Right to Indemnity.

The surety on an injunction bond cannot maintain a bill in equity in the nature of a bill *quia timet* against his principal to compel the latter to indemnify him against anticipated loss or liability. The implied legal obligation to indemnify arises only when the liability of the surety has been fixed.⁷⁷

⁷³ Coosaw Min. Co. v. Carolina Min. Co. (1896) 75 Fed. 880.

⁷³ Russell v. Farley (1881) 105 U. S. 446, 26 L. ed. 1064; West v. East Cedar Co. (C. C. A.; 1902) 51 C. C. A. 416, 113 Fed. 742.

⁷⁴ Leslie v. Brown (C. C. A.; 1898) 32 C. C. A. 556, 90 Fed. 171.

⁷⁵ Terry v. Robbins (1903) 122 Fed. 725.

⁷⁶ Oelrichs v. Spain (1872) 15 Wall. 211, 229, 21 L. ed. 43, 44.

⁷⁷ American Bonding etc. v. Logansport etc. Gas Co. (1889) 95 Fed. 49. There was an express covenant in this case to indemnify the surety, but the court held that it went no further than the implied obligation.

*Final Injunction.***§ 2433. Incident of Final Decree.**

An injunction is permanent or final only when the order is entered at the hearing on the merits and is made a part of the final decree.⁷⁸ Being a part of the final decree, the final injunction abides the fate of the decree itself.⁷⁹

§ 2434. Defense after Pro Confesso.

A defendant who has made no appearance in a suit for an injunction until a decree *nisi* for a perpetual injunction has been entered upon a *pro confesso* may come in at any time before the decree is made absolute and file his answer. This is a matter of right and not of favor.⁸⁰

§ 2435. Final Decree Not Concluded by Preliminary Decree.

In determining whether a perpetual injunction shall be granted, the court is not bound by its previous decision in the matter of a motion for a preliminary injunction, that ruling being always open to review or reversal at the final hearing.⁸¹ But as a matter of judicial consistency the decision of the court upon application for the preliminary injunction will be adhered to at the final hearing where the case made at such hearing is substantially the same as at the preliminary hearing, no new facts being introduced that would require a modification of the previous decree.

§ 2436. Considerations Affecting Right to Final Injunction.

As regards the principle governing the right to final injunctive relief, it may be observed that the considerations upon which the courts act are here quite different from those that control upon the hearing of an application for a preliminary injunction.⁸² The preliminary injunction, as we have already learned, is a purely provisional remedy; and it is granted upon the situation as presented to the court at the time the application is made, and with a view to the preservation of possible rights that might be lost if a temporary

⁷⁸ *Adams v. Crittenden* (1881) 17 Fed. 42. ⁸¹ *Rodgers v. Pitt* (1904) 129 Fed. 932, 936.

⁷⁹ *Buffington v. Harvey* (1877) 95 U. S. 99, 24 L. ed. 381. ⁸² *Colorado Eastern R. Co. v. Chicago etc. R. Co.* (C. C. A.; 1905) 73 C. C. A.

⁸⁰ *Mason v. Jones* (1847) 1 Hayw. & H. 323, Fed. Cas. No. 9,239. 132, 141 Fed. 898.

injunction were not granted. The right to a final and permanent injunction, however, will only be recognized where the plaintiff at the final hearing clearly makes out his title to relief. The facts justifying the writ must be clearly established.⁸³

§ 2437. Balance of Convenience Not Determinative.

The doctrine of the balance of convenience or injury, which often determines the granting or refusal of a preliminary injunction, has little or no application on final hearing. After all the proofs have been taken and the cause heard, the question of injunction or no injunction becomes a question of right. Rights are not to be measured, so it is said, by their money value, neither are wrongs to be tolerated because it may be much to the advantage of the wrongdoer. If the court is satisfied that the plaintiff's right is established, that the injury to him is substantial, and that pecuniary damages would not afford adequate redress, the injunction will be granted though the enforcement of it will evidently entail much loss on the other party. The fact that the defendant has invested considerable money in the business or property in respect to the use of which the injunction is granted supplies no conclusive reason for refusing it.⁸⁴

§ 2438. When Granting of Permanent Injunction Discretionary.

But though, as a general rule, the granting of a permanent injunction is governed by a consideration of the respective naked rights of the parties and the injunction will usually be granted in any case where a clear right in the plaintiff and a violation of that right on the part of the defendant are shown; yet situations are sometimes presented where the court, in the exercise of its equitable powers, will treat the granting of the permanent injunction as a matter of discretion, and will refuse the injunction if it appears that the granting of it would work an injury to the defendant, or the public, vastly out of proportion to the benefit that would inure to the plaintiff. But this can only be done, probably, where the defendant has a remedy at law to recover damages for the wrong done to him.

McCarthy v. Bunker Hill etc. Co. (1906) 147 Fed. 981: In a suit to abate a nuisance resulting from the pollution of a stream by mining operations conducted

⁸³ *McCarthy v. Bunker Hill etc. Coal Co.* (1906) 147 Fed. 981, 984. less the fraud is clearly established. *Gaines v. Nicholson* (1850) 9 How. 356,

A perpetual injunction against the prosecution of an action at law will not be granted on the ground of fraud, unless the fraud is clearly established. 13 L. ed. 172. ⁸⁴ *U. S. v. Luce* (1905) 141 Fed. 385, 416.

by the defendant, it appeared that many millions of dollars had been invested in the business, which had been established long before the plaintiffs acquired the properties injuriously affected by the pollution. Many thousands of persons were employed about the mine; and if the injunction had been granted, the business would have been stopped, to the serious detriment of such employees and to others in the community. The injunction was refused.⁸⁵

§ 2439. Form of Decree—Retention of Jurisdiction over Injunction.

The decree granting a permanent injunction will be so framed and adapted as to subserve the end in view without unduly interfering with the party against whom the relief is granted. And the court may retain the cause, in order that it may from time to time take cognizance of the situation and see that its object is not thwarted.

United States v. Luce (1905) 141 Fed. 385, 422: In a suit for an injunction to abate a nuisance created by odors from a fish factory the court found in favor of the plaintiff, but it was loath to stop the operation of the factory altogether and thereby destroy the defendant's business. Accordingly a decree was drawn enjoining the defendants from the operation of the factory, unless with due use of deodorizers and disinfectants and with due attention to the combustion of noxious odors, etc., so as thereby the nuisance might be abated. And the court entered an order retaining full control over the cause to the end that it might make future orders and decrees necessary to the final suppression of the nuisance.

§ 2440. Modification of Injunction upon Change of Conditions.

If a new situation arises, after a decree granting a permanent injunction has been entered, whereby the injunction becomes inapplicable and the enforcement of it unjust, the court will modify the same, provided an application for a rehearing and modification, or for review, is brought in time. But if the court has, by the effluxion of time, lost jurisdiction to entertain the application, then the proper course for the party against whom the injunction was granted to pursue is, if he is so advised, to proceed to do the act enjoined; whereupon if he is brought up in contempt proceedings, he will be permitted to show that by reason of the changed circumstances the injunction is no longer applicable.⁸⁶

§ 2441. Supplemental Bill by Person Deriving Title from Plaintiff.

Where a perpetual injunction is granted in favor of the owner of real property to prevent unlawful trespasses thereon by the defend-

⁸⁵ Compare *New York City v. Pine* (1905) 185 U. S. 93, 46 L. ed. 820, 22 Sup. Ct. 593; *Mountain Copper Co. v. U. S.* (C. C. A.; 1906) 73 C. C. A. 621, 142 Fed. 630. ⁸⁶ *Hatch v. Willamet Iron Bridge Co.* (1886) 27 Fed. 673. But see *post*, §

ant, a subsequent purchaser of that property, deriving title from the plaintiff in the injunction suit, may get the benefit of the former decree by means of a supplemental bill or bill in the nature of a supplemental bill. In this bill he should show the derivation of his title from the original plaintiff and that the land in question was included in the former decree. In such a proceeding the former decree of injunction is made effective in favor of the new proprietor; and a new injunction deriving from and based on the original injunction is not granted. It has been held that a petition for a new injunction based on the prior injunction is informal and unsanctioned by good practice.⁸⁷

§ 2442. Supplemental Bill against Person Deriving from Defendant.

If the defendants in a suit for an injunction form a corporation while the suit is pending and transfer to it all their interest in the business in respect to which the injunction is sought, the corporation must be brought in by supplemental bill, or relief cannot be granted against it.⁸⁸

§ 2443. Second Suit for Injunction.

The filing of a suit to restrain a renewed trespass upon real property does not waive the benefit of an injunction previously obtained by the same plaintiff against the same defendant in respect of former trespasses of a slightly different character on the same property.⁸⁹

⁸⁷ *Leverich v. Mobile* (1903) 122 Fed. 549. ⁸⁸ *Bond v. Pennsylvania Co.* (C. C. A.; 1903) 61 C. C. A. 355, 126 Fed. 151.
⁸⁹ *Corbin v. Taussig* (1905) 137 Fed. 749.

CHAPTER LX.

CONTEMPT.

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General Principles.

§ 2444. Contempt in General.

Any wilful disregard of the rightful authority of a court or disobedience to its lawful order is said to be a contempt of court.¹ The offense is in the nature of a crime, the commission of which subjects the offender to punishment by fine or imprisonment. The present chapter is chiefly concerned with contempts incurred by the violation of injunctions; but within certain limits, the principles governing the procedure in such cases are applicable to all contempts.

§ 2445. Nature and Limits of Power to Punish Contempt.

The power to punish for contempt is perhaps the highest exercise of judicial authority, and it belongs to judges of courts of record and

¹ Disobedience to the legitimate authority of the court is a contempt, unless the party can show sufficient cause to excuse it. *Wartman v. Wartman* (1853) Taney 370.

to superior courts generally.² Its existence is essential to the preservation of order in judicial proceedings and the due administration of justice.³ The moment the federal courts were called into existence and invested with jurisdiction over any subject, they became possessed of this power.⁴ But it can only be exercised to insure order and decorum in their presence, to secure faithfulness on the part of their officers in official transactions, and to enforce obedience to their lawful orders, judgments, and processes.⁵

§ 2446. Statute Concerning Punishment of Contempt.

The conditions under which the federal courts have authority in this respect are defined and limited by the following statute.

Revised Statutes, section 725: The said courts shall have power to impose and administer all necessary oaths, and to punish, by fine or imprisonment, at the discretion of the court, contempts of their authority: Provided, that such power to punish contempts shall not be construed to extend to any cases except the misbehavior of any person in their presence, or so near thereto as to obstruct the administration of justice, the misbehavior of any of the officers of said courts in their official transactions, and the disobedience or resistance by any such officer, or by any party, juror, witness, or other person, to any lawful writ, process, order, rule, decree, or command of the said courts.⁶

§ 2447. Purpose of Statute—Newspaper Comments on Trial.

On the whole, the foregoing statute must be considered to be merely declaratory of general principles already recognized and established by the courts; but in one respect it embodies a substantial limitation upon the authority of the federal courts. Thus, before the passage of this act, it was held that any publication, pending a suit, reflecting on the court, the jury, the parties, the officers of the court, or counsel, which would tend to influence the decision of the controversy one way

² *In re Mason* (1890) 43 Fed. 515.

³ *Interstate Commerce Comm. v. Brimson* (1894) 154 U. S. 447, 28 L. ed. 1047; *In re Nevitt* (C. C. A.; 1902) 54 C. C. A. 622, 117 Fed. 448; *In re Perkins* (1900) 100 Fed. 950.

⁴ *Ex parte Robinson* (1873) 19 Wall. 510, 22 L. ed. 207; *Eilenbecker v. District Court of Plymouth County* (1890) 134 U. S. 31, 33 L. ed. 801.

⁵ *Ex parte Robinson* (1873) 19 Wall. 511, 22 L. ed. 208; *Boyd v. Glucklich* (C. C. A.; 1902) 53 C. C. A. 451, 116 Fed. 136.

⁶ *In Ex p. Robinson* (1873) 19 Wall.

510, 22 L. ed. 207, Mr. Justice Field remarked that this statute undoubtedly applies to the circuit and district courts; but he queried whether it could be held to limit the authority of the supreme court, which derives its existence and powers from the constitution. But this doubt is apparently unwarranted. It seems to be entirely within the constitutional powers of Congress to regulate and define the limits of the power of the supreme court to punish for contempt, so long as it does not attempt radically to impair that power or to take it away entirely.

or the other, could be punished as a contempt.⁷ The exercise of this power by one of the federal judges⁸ during the first half of the nineteenth century led to the preferring of articles of impeachment against him and to his consequent trial before the Senate. The impeachment proceedings were not successful, but the incident led to the passage of this statute. It was intended by this enactment to prevent the courts from unduly interfering with newspaper comments on trials.⁹ Under this act, a criticism of judicial acts that amounts to no more than a libel on a court or its officers cannot be punished as a contempt;¹⁰ yet the court can exclude from within the bar any persons coming there to report testimony during the trial.¹¹

§ 2448. Obstruction of Justice—How Punished.

There is one class of contempts expressly indictable as crimes against the United States, and punishable in independent criminal proceedings brought expressly for such purpose. These are concerned with the obstructing of justice and are dealt with in sections 5394 and 5398-5448, of the Revised Statutes. Such offenses are subject to prosecution upon indictments brought on the law side of the court, and are punishable by the fine and imprisonment provided in these several sections.

Where an offense is of such nature as to be indictable as an obstruction of justice and also such as to be at the same time punishable as a contempt of court under section 725 of the Revised Statutes, the mode of punishment provided for the offense when prosecuted as an indictable crime is not exclusive; and either mode of proceeding can be adopted.¹² But if an offense is of such nature as not to fall under the statutes in regard to the obstruction of justice, it is punishable exclusively under section 725, and the court has no power to impose any other punishment than that prescribed in this section.¹³

⁷ *Hollingsworth v. Duane* (1801) Wall. Sr. 77, 100, Fed. Cas. No. 6,616; *U. S. v. Duane* (1801) Wall. Sr. 102.

⁸ Judge James H. Peck, United States District Judge for the District of Missouri (1822-1836).

⁹ *In re Edward S. May* (1890) 1 Fed. 743.

¹⁰ *Ex parte McLeod* (1903) 120 Fed. 130; *Ex parte Poulson* (1835) Fed. Cas. No. 11,350; *Morse v. Montana Ore Purchasing Co.* (1900) 105 Fed. 337.

¹¹ *U. S. v. Holmes* (1842) 1 Wall. Jr. 1, Fed. Cas. No. 15,383.

¹² *Pettibone v. U. S.* (1893) 148 U. S. 197, 37 L. ed. 419; *Savin, Petitioner* (1899) 131 U. S. 267, 33 L. ed. 150; *Ex p. McLeod* (1903) 120 Fed. 130; *In re Brule* (1895) 71 Fed. 943.

¹³ *Ex p. Robinson* (1873) 19 Wall. 512, 22 L. ed. 208.

§ 2449. Punishing Contempt as Independent Crime.

It is universally recognized that a contempt proceeding in the federal court is criminal in its nature, and it is governed by the rules of construction applied in criminal cases.¹⁴ Being a specific criminal offense, any contempt may be prosecuted by indictment, though it is commonly prosecuted upon summary proceedings in the court against which the offense is committed.¹⁵ A commissioner has authority to arrest, imprison, or bail a person charged with a contempt of court, to the same extent as in case of any other criminal offense.¹⁶

§ 2450. Punishment of Contempt by Offended Court.

When a contempt of court is not made the subject of indictment and prosecution in an independent action at law, the proceedings to punish the contemnor must be conducted in the court against whose authority the offense has been committed. The power of the court to make an order carries with it the equal power to punish for a disobedience of that order, and the inquiry as to the question of disobedience is a special function of that court. A federal court has been said to be the sole judge of a question of contempt committed before it, and no other court may assume to revise its judgment upon the subject; and even the supreme court upon appeal will not review the action of the lower courts in imposing a fine for contempt.¹⁷ No court has jurisdiction to punish a party for a contempt committed in another court.¹⁸ A federal court has no jurisdiction to punish disobedience of an injunction granted by a state court.¹⁹

Where a cause has been to the circuit court of appeals and a mandate from that court has been returned to the lower court, the jurisdiction to punish the violation of an injunction is in the lower court;

¹⁴ *New Orleans v. New York Mail Steamship Co.* (1874) 20 Wall. 392, 22 L. ed. 357; *Ex parte Kearney* (1822) 7 Wheat. 38, 5 L. ed. 391; *In re Mullee* (1869) 7 Blatchf. 23; *Durant v. Washington County* (1869) Woolw. 377; *In re Ellerbe* (1882) 13 Fed. 532; *U. S. v. Atchison etc. R. Co.* (1883) 16 Fed. 853; *U. S. v. Berry* (1885) 24 Fed. 783; *Kirk v. Milwaukee Dust Collector Mfg. Co.* (1885) 26 Fed. 505.
¹⁵ *U. S. v. Jacobi* (1871) 1 Flipp. 108; *In re Ellerbe* (1882) 13 Fed. 530; *In re Acker* (1894) 66 Fed. 290; *Castner v. Pocahontas Collieries Co.* (1902) 117 Fed. 184.
¹⁶ *Castner v. Pocahontas Collieries Co.* (1902) 117 Fed. 184.
¹⁷ *Boyd v. U. S.* (1886) 116 U. S. 616, 29 L. ed. 746; *New Orleans v. New York Mail Steamship Co.* (1874) 20 Wall. 397, 22 L. ed. 354; *Cuddy, Petitioner* (1889) 131 U. S. 283, 53 L. ed. 155; *In re Ellerbe* (1882) 13 Fed. 530.
¹⁸ *Ex p. Bradley* (1868) 7 Wall. 364, 19 L. ed. 214; *U. S. v. Green* (1898) 85 Fed. 859; *In re Litchfield* (1882) 13 Fed. 863; *In re Nevitt* (C. C. A.; 1902) 54 C. C. A. 622, 117 Fed. 448.
¹⁹ *McLeod v. Duncan* (1852) 5 McLean 342.

and the circumstance that the appellate court has modified the terms of the injunction as originally granted by the lower court does not affect this jurisdiction.²⁰

§ 2451. Contempt Proceedings as Due Process of Law—Jury Trial.

The action of a court of equity in committing a party for contempt, upon a hearing before the court itself, in accordance with the ancient practice of courts of chancery, is not subject to criticism as imposing punishment without due process of law.²¹ The accused does not have the right, in such case, to insist that he shall be tried in any other court or in any other way than that which the equity court, in accordance with its practice, may see fit to adopt. To be specific, proceedings for contempt have never been subject to the right of trial by jury; and a person brought up for contempt has no right to insist that he shall be so tried.²²

In re Debs (1895) 158 U. S. 564, 594, 39 L. ed. 1092, 1106: It was insisted that to deprive the accused of a jury trial for such an offense operated to deprive him of his constitutional right. Mr. Justice Brewer met this contention thus: "But the power of a court to make an order carries with it the equal power to punish for a disobedience of that order, and the inquiry as to the question of disobedience has been, from time immemorial, the special function of the court. And this is no technical rule. In order that a court may compel obedience to its orders it must have the right to inquire whether there has been any disobedience thereof. To submit the question of disobedience to another tribunal, be it a jury or another court, would operate to deprive the proceeding of half its efficiency."

Contempt of Injunction.

§ 2452. Violation of Injunction as Contempt of Court.

Disobedience to an injunction is a contempt of court and may be punished by fine or imprisonment.²³ Aiding, advising, or persuading another to do a forbidden act is also a contempt and punishable as such.²⁴ But an attorney is not deemed to be guilty of a contempt for

²⁰ *Dowagiac Mfg. Co. v. Minnesota Moline Plow Co.* (C. C. A.; 1903) 61 C. C. A. 57, 124 Fed. 735.

²¹ *Eilenbecker v. Plymouth Co.* (1890) 134 U. S. 31, 33 L. ed. 801.

²² *Ex p. Terry* (1888) 128 U. S. 289, 32 L. ed. 405; *Savin, Petitioner* (1889) 131 U. S. 267, 33 L. ed. 150. *Cuddy, Petitioner* (1889) 131 U. S. 280, 33 L. ed. 154; *Eilenbecker v. Plymouth County* (1890) 134 U. S. 31, 33 L. ed. 801.

²³ *Atlantic Giant Powder Co. v. Dittmar Powder Mfg. Co.* (1881) 9 Fed. 316; *Wells v. Oregon R. etc. Co.* (1884) 19 Fed. 23; *In re North Bloomfield etc. Co.* (1886) 27 Fed. 795; *Indianapolis Water Co. v. American etc. Co.* (1896) 75 Fed. 972.

²⁴ *U. S. v. Debs* (1894) 64 Fed. 738; *Bate Refrigerating Co. v. Gillett* (1887) 30 Fed. 683; *Société Anonyme etc. v. Western Distilling Co.* (1890) 42 Fed. 96.

advice given in an honest belief as to the lawful limits of the authority of a court.²⁵

§ 2453. Notice of Injunction.

Before any person can be held liable as for a contempt, it must appear that he had notice of the injunction. Such notice is usually given by serving a copy of the injunction. If notice is not given in this way, it must appear that it was given by some other means. Proof of a giving of notice must be clear, especially where the plaintiff has not proceeded with promptitude.²⁶ The practice of dispensing with personal service of the injunction is permissible only in cases where this is necessary in order that the ends of justice may not be defeated. The relaxation of the rule is not designed to dispense in the slightest degree with the necessity of due notice to those who are intended to be bound by the injunction.²⁷

§ 2454. Sufficiency of Injunctive Order as Affecting Charge of Contempt.

A person cannot be held liable for the violation of an injunction unless the act enjoined is clearly and exactly defined so as to leave no reasonable doubt or uncertainty as to what specific act or thing is forbidden or required.²⁸

§ 2455. Who May Institute Contempt Proceedings.

An injunction obtained to protect a private right is so far within the control of the party obtaining it that only such persons as have a present interest in the right to be protected can be heard to complain of its violation. Where a plaintiff obtains an injunction and then parts with or loses all his interest in the subject-matter of the suit, he cannot thereafter maintain contempt proceedings for a violation of the injunction.²⁹

²⁵ *In re Watts* (1903) 190 U. S. 1, 47 L. ed. 933.

²⁶ *Dowagiac Mfg. Co. v. Minnesota Moline Plow Co.* (C. C. A.; 1903) 124 Fed. 736.

The following cases illustrate situations where persons against whom proceedings were brought have been held to have notice of the injunction. *In re Lennon* (1897) 166 U. S. 554, 41 L. ed. 1113; *Toledo etc. R. Co. v. Pennsylvania Co.* (1893) 19 L.R.A. 395, 54 Fed. 746, 757; *W. B. Conkey Co. v. Russell* (1901) 111 Fed. 417, 423; *Em-*

ployers' Teaming Co. v. Teamsters' Joint Council (1905) 141 Fed. 679, 688.

²⁷ *In re Cary* (1882) 10 Fed. 622, 626.

²⁸ *U. S. v. Atchison etc. R. Co.* (1905) 142 Fed. 176, 183. Compare *In re Huntley* (C. C. A.; 1898) 29 C. C. A. 468, 85 Fed. 889.

²⁹ *Secor v. Singleton* (1888) 35 Fed. 376 (where the property comprising the subject-matter of the injunction had been foreclosed under a mortgage and the title vested in the purchaser).

§ 2456. Against Whom Contempt Proceedings Maintainable.

The problem now to be considered is indicated in the question, Against whom may contempt proceedings be maintained? The answer to this is not as simple as might appear, and the solution of it in actual practice is sometimes a delicate and difficult matter. The point first to be noted is that a person does not have to be a technical party to the suit in order to be subject to punishment for disobeying an injunction.

1. *In re Lennon* (1897) 166 U. S. 548, 41 L. ed. 1110, 17 Sup. Ct. 658: Mr. Justice Brown laid down this doctrine in language that has often been quoted in the federal courts and uniformly followed: "To render a person amenable," said he, "to an injunction, it is neither necessary that he should have been a party to the suit in which the injunction was issued, nor have been actually served with a copy of it, so long as he appears to have had actual notice."

2. *American Steel etc. Co. v. Wire Drawers' Union* (1898) 90 Fed. 604: Judge Hammond, discussing the effect of an interlocutory injunction as regards the persons on whom it operates, said: "It is one of the features of an interlocutory injunction that it reaches all who are parties, whether they have been served with process of subpoena or not, whether they have appeared or not, whether they have answered or not; and it binds all who have notice of it, whether they are parties or not. It is old as the practice of injunctions that all having notice of it must obey it."

§ 2457. Basis of Power to Punish Nonparties.

The proposition that a stranger to any suit may be punished for violating an injunction granted in such suit has the appearance of a paradox, and it seems to violate the most fundamental principle of legal and equitable procedure. It is a universal principle of jurisprudence that one who is not a party to a suit is not bound by any decree that the court may make in the cause. So carefully is this principle guarded in the federal court that it is expressly provided, in equity rule 48, that even where the parties are numerous and cannot all be brought before the court, persons who are represented in the proceedings but who are not actual parties are not bound by the decree, and the same is without prejudice to their rights and claims. We are now to learn how the courts of equity, while theoretically recognizing the full force of that principle, nevertheless contrive to enforce their injunctions against non-parties.³⁰ To say that a person whose interests and rights are concededly unaffected by a

³⁰ Equity rule 48, which provides that those not made parties may be bound by in class bills the decree shall be without an injunction if they have notice. *American Steel etc. Co. v. Wire Drawers' Union* (1898) 90 Fed. 598, has no bearing on the practice whereby

decree may yet be punished for disobeying an order granted in the cause certainly seems somewhat self-contradictory; and it is not easy to state the exact principle upon which the two notions can be reconciled. The distinction seems to be found in the difference, on the one hand, between the conception of *res judicata* (according to which a party's interests, rights, and claims to the subject-matter of the suit are concluded by the decree) and the idea, on the other hand, that disobedience to an injunction constitutes an interference with a piece of judicial machinery. The whole doctrine concerning the punishment of contempts, so far at least as it concerns strangers to the suit, rests upon the idea that the courts are organs for the administration of justice, and that all the writs, processes, orders, rules, and commands lawfully issued during the progress of the suit are mere instruments by which the functions, ends, and aims of the courts are accomplished. Any one who wilfully interferes with the operation of these instruments does so at his own peril, and he thereby becomes guilty of a contempt and is subject to punishment for his offense.

§ 2458. Two Elements Involved in Contempt of Injunction.

In order to understand the principle upon which the courts here proceed, it is necessary to bear in mind that, as explained in the following authorities, a contempt of court involves, or may involve, two elements, namely, (1) the violation of the individual right of the litigant in whose behalf the injunction was granted and for whose protection the order was made, and (2) the offense against the majesty and dignity of the court. If the contempt proceedings are brought against a contemnor who is a technical party to the suit, both of these factors enter into consideration; but if the proceedings are instituted against one who is not a party, he can be punished only in so far as his act involves an offense against the court. The violation of an injunction therefore involves, or may involve, both a civil and a criminal aspect. As between the immediate parties to the suit, the injunctive order creates a legal obligation whereby the plaintiff acquires a specific title, or right, as against the defendant, to have the injunctive order respected; and the defendant owes the plaintiff the legal duty to respect it. A violation of that obligation gives rise to a claim on the part of the plaintiff to be compensated for the civil wrong done him. It follows that a party who is actually bound by an injunction is both civilly and criminally liable for its violation; civilly liable for the damages resulting from the breach of the injunc-

tive obligation laid on him in favor of the plaintiff, and criminally liable for his contempt of court and obstruction of justice. On the other hand, as against a person who is not a party to the suit, contempt proceedings are of a purely punitive character.

1. *In re Reese* (C. C. A.; 1901) 47 C. C. A. 87, 107 Fed. 942: The court explained the ground for the rule that one who is not a party to the suit may be punished for obstructing the administration of justice and consequently for violating an injunctive order, in the following words: "It is entirely consonant with reason, and necessary to maintain the dignity, usefulness, and respect of a court, that any person, whether a party to a suit or not, having knowledge that a court of competent jurisdiction has ordered certain persons to do or to abstain from doing certain acts, cannot intentionally interfere to thwart the purposes of the court in making such order. Such an act, independent of its effect upon the rights of the suitors in the case, is a flagrant disrespect to the court which issues it, and an unwarrantable interference and obstruction to the orderly and effective administration of justice, and as such is and ought to be treated as a contempt of the court which issued the order. Such contempts, however, are totally different offenses from those which the parties to the case commit when they disobey a direct order made in a case for the benefit of the complainant. The one is an offense against the majesty and dignity of the law. The other is a violation of the rights of a particular suitor, at whose instance and for whose protection the particular injunctive order disobeyed was issued by the court."

2. *Christensen Engineering Co. v. Westinghouse etc. Co.* (C. C. A.; 1905) 68 C. C. A. 476, 135 Fed. 779: The two different elements entering into contempts involving the violation of an injunction were thus exhibited from another point of view by Wallace, Circuit Judge: "Proceedings of contempt are of two classes—those prosecuted to preserve the power and vindicate the dignity of the courts by punishing the contemnor, and those prosecuted to compel observance and redress the violation of orders or decrees made in behalf of a party to an action pending before the court. The former are punitive and essentially criminal in their nature, and the government, the courts, and the people are interested in their prosecution. The latter are civil, remedial, and coercive in their nature, and the parties chiefly interested in their conduct and prosecution are the individuals whose private rights and remedies they are necessary to redress. The intentional violation of an injunction by a party to the case is an act in defiance of the authority of the court and in derogation of the rights of the adverse party, and a prosecution for contempt in such case may partake of both a punitive and a remedial character. The proceeding is not one to enforce the criminal laws, but is one of a quasi-criminal nature."

3. *Bessette v. W. B. Conkey Co.* (1904) 194 U. S. 324, 48 L. ed. 997: In considering the difference between the two elements that may be involved in contempt proceedings, the supreme court, after quoting with approval the language used by Judge Sanborn in a case decided in the circuit court of appeals,²¹ proceeded to

²¹ *In re Nevitt* (C. C. A.; 1902) 54 classes,—those prosecuted to preserve C. C. A. 622, 117 Fed. 458, 459. In this the power and vindicate the dignity of case, Sanborn, Circuit Judge, observed: the courts and to punish for disobedience "Proceedings for contempts are of two their orders, and those instituted to pre-

add: "If one inside of a court room disturbs the order of proceedings, or is guilty of personal misconduct in the presence of the court, such action may properly be regarded as a contempt of court, yet it is not misconduct in which any individual suitor is specially interested. It is more like an ordinary crime which affects the public at large, and the criminal nature of the act is the dominant feature. On the other hand, if in the progress of a suit a party is ordered by the court to abstain from some action which is injurious to the rights of the adverse party, and he disobeys that order, he may also be guilty of contempt, but the personal injury to the party in whose favor the court has made the order gives a remedial character to the contempt proceeding. The punishment is to secure to the adverse party the right which the court has awarded to him. . . . It may not be always easy to classify a particular act as belonging to either one of these two classes. It may partake of the characteristics of both. A significant and generally determinative feature is that the act is by one party to a suit in disobedience of a special order made in behalf of the other. Yet sometimes the disobedience may be of such a manner as to indicate a contempt of the court rather than a disregard of the rights of the adverse party."

4. *Seaward v. Paterson* [1897] 1 Ch. 545, 76 L. T. N. S. 215: An injunction was issued against Paterson to restrain him from holding glove-fights or boxing contests on certain premises. One Murray, who had later acquired possession of the premises and conducted boxing contests thereon, was cited for contempt. It was insisted in his behalf that he was neither a party to the action nor an agent or servant of such party, and that consequently he could not be held. He was adjudged guilty of contempt, however, on the ground of knowingly aiding and assisting in doing that which the court had prohibited. In approving of this action on the part of the trial court, the court of appeals drew a distinction between the kind of contempt here complained of and that which consists in a disobedience to an order by a party to the suit. Among other things, Lindley, L. J., after observing that Murray was not a party to the action, either first or last, but that he knew all about the order and was responsible for the violation of it, said: "Now, let us consider what jurisdiction the court has to make an order against Murray. There is no injunction against him. He is no more bound by the injunction granted against Paterson than any other member of the public. He is bound, like other members of the public, not to interfere with, and not to obstruct, the course of justice; and the case, if any, made against him must be this—not that he has technically infringed the injunction, which was not granted

serve and enforce the rights of private parties to suits, and to compel obedience to orders and decrees made to enforce the rights and administer the remedies to which the court has found them to be entitled. The former are criminal and punitive in their nature, and the government, the courts, and the people are interested in their prosecution. The latter are civil, remedial, and coercive in their nature, and the parties chiefly in interest in their conduct and prosecution are the individuals whose private rights and remedies they were instituted to protect or enforce. . . . A criminal contempt involves no element of personal

injury. It is directed against the power and dignity of the court, and private parties have little if any interest in the proceedings for its punishment. But if the contempt consists in the refusal of a party or a person to do an act which the court has ordered him to do for the benefit or the advantage of a party to a suit or action pending before it, and he is committed until he complies with the order, the commitment is in the nature of an execution to enforce the judgment of the court, and the party in whose favor that judgment was rendered is the real party in interest in the proceedings."

against him in any sense of the word, but that he has been aiding and abetting others in setting the court at defiance, and deliberately treating the order of the court as unworthy of notice. If he has so conducted himself, it is perfectly idle to say that there is no jurisdiction to attach him for contempt as distinguished from a breach of the injunction. . . . I confess that it startled me, as an old equity practitioner, to hear the jurisdiction contested upon the facts in this case. It has always been a familiar doctrine to my brother Rigby and myself that the orders of the court ought to be obeyed, and could not be set at naught and violated by any member of the public, either by interfering with the officers of the court, or by assisting those who are bound by its orders."

§ 2459. No Person Punishable unless Included in Injunction.

The proposition that one who is not a party to a suit may be punished for violating an injunction, or injunctive order, is not to be understood as embodying a proposition to be generally applied in any and every case without regard to its natural and proper limitations. One limitation is to be found in the rule that no person can, as a rule, be held liable for the breach of an injunction unless he is in some way included within the terms of the order. Before the court can punish a man for disobedience, it must speak *to him*. It is not necessary that he should have been mentioned by name; but it is necessary that he should be included under some general term used in describing the persons to whom the order is to apply. It is for this reason that injunctions are usually drawn so as to run against and include the defendants, their agents, attorneys, and servants, and all persons aiding, abetting, or confederating with them.³² An injunction issued against one man enjoining and restraining him and all that give assistance to him or aid and abet him is valid against everybody who lends aid to the person specially enjoined.³³ Injunctive orders are sometimes so drawn as to extend to and include "all persons whomsoever,"³⁴ but unless this broad term is qualified so as to apply only to those conspiring or combining with the defendant, or aiding and abetting him, its efficacy is questionable; or at least such an expression could not properly be extended to any other than those who do in fact act in privity with the defendant or combine and conspire with him or aid him in the violation of the injunction.

³² *In re Reese* (C. C. A.; 1901) 47 C. C. A. 87, 107 Fed. 943. The order here ran against the defendants "and each of them, and all other persons who have or may combine, confederate, or conspire with said defendants, or either of them."

³³ *United States v. Agler* (1894) 62 Fed. 827.

³⁴ *Chisolm v. Caines* (1903) 121 Fed. 397, 399. But as to this case, see below.

§ 2460. Stranger Punishable Only by Virtue of Privity with Defendant.

It may be laid down as a general rule that one who is not a party to a suit can only be held liable for violation of an injunctive order upon a showing that he occupies a relation of privity with the defendant, as by being his attorney, agent, or servant, or that he has confederated with or has aided or abetted the defendant, in the violation of the injunction. The power of the court to act upon a person not a party to the suit depends on the fact of privity or confederacy; and one who is not alleged to be an aider or abettor of the actual defendant or his agent or servant, cannot be punished.³⁵ A person is not liable to be punished as for a contempt where, not being a party to the suit, he acts independently in violating the injunction, and without any connection with the parties actually enjoined.³⁶ The following case decided in a circuit court holds to the contrary of the proposition just stated; but a careful consideration of the situation involved in this decision will show, we think, that the court here exceeded the proper scope of its powers and went further than sound principles of equity procedure can justify.

Chiselm v. Caines (1903) 121 Fed. 397: A decree had been obtained establishing the plaintiff's title to land and enjoining trespasses thereon. The decree of injunction ran against the defendants, their agents, attorneys, and all persons whomsoever. Afterwards certain persons who were neither parties nor privies to the original suit, but who had notice of the injunction, were brought up for a violation of it. So far as appeared, these individuals acted independently of the defendants, and they were in no respect connected with them, nor with the record. Nor were they alleged to have been aiding or abetting the defendants in the violation of the injunction. It was nevertheless held that they could be punished.

³⁵ "It is only as confederates (that is, aiders and abettors) with the defendants in the bill or some of them that the court has any jurisdiction." *Ex parte Richards* (1902) 117 Fed. 658, 663.

Where a person is proceeded against as one of those denominated in the bill as "unknown confederates," it must appear that such person is engaged in aiding or abetting those who are actual parties. *U. S. v. Agler* (1894) 62 Fed. 824, 828.

³⁶ *In re Reese* (C. C. A.; 1901) 47 C. C. A. 87, 107 Fed. 942. See also *W. B. Conkey Co. v. Russell* (1901) 111 Fed. 417; *Employers' Teaming Co. v. Teamsters' Council* (1905) 141 Fed. 679; *Huttig Sash etc. Co. v. Fuelle* (1906) 143 Fed. 363, 368.

The proposition that a stranger to a suit cannot be punished for a contempt except upon showing of some sort of privity or connection with the party actually enjoined is to be understood as applying to cases involving the violation of injunctive orders granted by the court for the benefit of a litigant. It evidently does not apply to those contempts that consist of criminal offenses against the dignity of the court, such as raising a disturbance in the presence of the court, or resisting an officer in the execution of lawful process, or otherwise interfering with the course of justice. Anybody can of course be taken up and punished for a contempt of this kind.

[The decision appears to be wrong on this point, in any aspect. A court unquestionably has power, under section 725 of the Revised Statutes, to punish any person for disobedience to any lawful order, decree, or command. But we think that before a decree or command can be considered "lawful" as against one who is not a party, he must stand in such relation to the parties of record as to give the court jurisdiction over him. It will be noted that the injunction here violated was a perpetual injunction, and the course pursued by the court in this case was such as in effect to make the decree final and effective against everybody. If the property in controversy had been in the possession of the court at the time of the trespass, or if the court had been exercising jurisdiction *in rem* over the property, the court would no doubt have had power to punish the independent trespassers. But this was not the case. There was one factor involved in this case, however, that is almost sufficient to justify the action of the court. This is found in the circumstance that the suit to determine the title to the property had involved a question of public right, and it might have been argued that these independent trespassers, being a part of the general public, had been concluded by the decree. But the suit was not litigated in a way to make this idea effective; and the court expressly refrained from basing its action on this ground.]

Proceedings Incident to Punishing Contempt.

§ 2461. Direct Contempt—Summary Proceedings.

When a contempt is committed directly in the presence of the court or so near thereto as to obstruct the administration of justice, the court has power to punish the offender by summary proceedings; and in such case the court may adopt such mode of determining the question of guilt as it deems proper, having due regard to the essential rules that prevail in the trial of matters of contempt.³⁷ The court may, upon its own knowledge of the facts, without further proof, without issue or trial (and without hearing an explanation of the motives of the offender), immediately proceed to determine whether the facts justify punishment, and to inflict such punishment as seems proper within the limits allowed by law.³⁸ The testimony in such a proceeding may be heard orally in open court, if desirable.³⁹

§ 2462. Indirect Contempt—Affidavit and Rule to Show Cause.

The practice in regard to the mode of instituting proceedings for acts done in violation of an injunction beyond the precincts of the court has not been uniform throughout the various circuits, though it is everywhere agreed that such proceedings must be begun upon

³⁷ Savin, *Petitioner* (1889) 131 U. S. 267, 33 L. ed. 150. ³⁸ Savin, *Petitioner* (1889) 131 U. S. 269, 33 L. ed. 152.

³⁹ *Ex p. Terry* (1888) 128 U. S. 289, 32 L. ed. 406.

information, motion, petition, or rule to show cause, of which the defendant is required to have due notice. In some of the circuits the practice has long been for the court, upon the filing of an affidavit, or affidavits, charging a person with the violation of an injunction, thereupon to grant a rule requiring such person to appear and show cause why he should not be attached for contempt.⁴⁰

Fanshawe v. Tracy (1868) 4 Biss. 490, Fed. Cas. No. 4,643: "The practice in this district [Illinois] has been, when affidavits are presented charging a person with the violation of an order of the court or of an injunction, for a rule to show cause to issue, requiring him to appear in court and furnish some good reason why an attachment should not be issued against him. It has also been supposed to be within the power of the court to issue an attachment in the first instance without the necessity of a rule to show cause."

§ 2463. Same—Affidavit and Motion to Commit.

In other circuits, a practice has prevailed whereby the party complaining of the violation of the injunction, upon affidavit, moves or petitions the court to commit the defendant for contempt, or that the defendant may stand committed for his contempt, and that an attachment may issue to this end, notice being given of such motion or petition.⁴¹

Gray v. Chicago etc. R. Co. (1864) Woolw. 63, Fed. Cas. No. 5,713: Mr. Justice Miller said: "The proper and regular course for proceeding against persons who are alleged to have committed a contempt of the court in disobeying the command of a writ of injunction, is by motion to commit. The party proceeded against must have due and reasonable notice of this motion before it should be granted. An opportunity to be heard must be given before the party can be deprived of his liberty."

§ 2464. Mode of Proceeding in English Chancery.

The difference between the two modes of proceeding is not very great, nor does it involve any very serious consequences; but the proceeding by motion to commit is the simpler, and this course is more in conformity with the practice of the English chancery.

3 Daniell, Chancery Practice, 372: "Where a party has been guilty of a contempt by the breach of an injunction, the proper course of proceeding, if he be

⁴⁰ See *Christensen Eng. Co. v. West- ument is not the only method that may inghouse etc. Co.* (C. C. A.; 1905) 68 be pursued in contempt proceedings, it C. C. A. 476, 135 Fed. 779. is a proper method. *American Constr.*

⁴¹ *Worcester v. Truman* (1839) Fed. Co. v. *Jacksonville etc. R. Co.* (1892) 52 Cas. No. 18,043. Fed. 938.

While a motion and rule for attach-

not a peer or otherwise entitled to privilege of Parliament, is to obtain an order for his committal. This order must be obtained on motion, of which notice must have been duly served upon him personally. And it is to be observed that the terms of the notice of motion should be that the party 'may stand committed' to the Fleet prison, for breach of the injunction, and not 'that he may show cause why he should not be committed.' The plaintiff however may, as it seems, obtain an order *ex parte* that the defendant may stand committed on a certain day unless he shows cause against it, which order must be personally served upon the party to be committed. But whether it be the order *nisi* or a notice of a motion for an absolute committal, the service must be personal, unless the defendant has absconded: in which case, an order may be obtained that service on his clerk in court or at his last place of abode shall be deemed good service."

§ 2465. Motion May Be Made in Vacation.

The motion to commit a party for contempt may be made to a judge of the court during vacation; and upon a sufficient showing the judge has authority to award an attachment, as the court is always open for interlocutory proceedings on the equity side, and the granting of an attachment for a contempt is an interlocutory proceeding within the meaning of the rule.⁴²

§ 2466. Notice of Motion to Attach for Contempt.

In the practice of the federal courts, a rule requiring that the person to be attached for contempt shall be personally served with notice of the motion is generally recognized. Thus an attachment for the violation of an injunction has been denied where such person had had no notice of the motion;⁴³ and an order of arrest issued without notice will usually be discharged on motion.⁴⁴ However, the court may, in a proper case, order that substituted service on the solicitor of record,⁴⁵ or by leaving a copy at the defendant's place of abode,⁴⁶ shall be sufficient; and it seems that personal notice is not absolutely essential in any case where the person to be attached is an actual party to the suit and has had due notice of the injunction. Having violated an order of whose existence he was fully aware, he is subject to attachment at any time and without further notice. If the court thinks proper to order substituted service, it would seem to be a mere matter of favor.

⁴² *Vose v. Reed* (1871) 1 Woods 647, Fed. Cas. No. 17,011.

⁴³ *Lefavour v. Whitman Shoe Co.* (1894) 65 Fed. 785; *American Constr. Co. v. Jacksonville etc. R. Co.* (1892) 52 Fed. 937.

⁴⁴ *Gray v. Chicago etc. R. Co.* (1864) Woolw. 63, Fed. Cas. No. 5,713.

⁴⁵ *Bate Refrigerating Co. v. Gilett* (1885) 24 Fed. 696.

⁴⁶ *Hollingsworth v. Duane* (1801) Wall. Sr. 141, Fed. Cas. No. 6,617.

1. *Eureka Lake etc. Co. v. Yuba County* (1886) 116 U. S. 410, 29 L. ed. 671, 6 Sup. Ct. 429: An order to show cause why a party should not be punished for contempt in the violation of a restraining order had been granted, but the party against whom the order was made concealed himself so that service could not be had upon him. Upon a return showing this fact, the court ordered that service should be had on his attorney of record.

2. *Christensen Eng. Co. v. Westinghouse etc. Co.* (C. C. A.; 1905) 68 C. C. A. 476, 135 Fed. 774: Contempt proceedings against a party to the suit were resisted on the ground that he had not been duly served with notice of the application for the attachment. His attorneys of record had, however, been given notice, and the plaintiff had forwarded to him a registered letter containing the requisite notice and a copy of the affidavits. This registered letter was returned as "refused." It was held that the attachment and the proceedings were valid. The defendant's attorney presumptively gave his client notice; and, besides, by refusing to receive the registered package the defendant showed that he was aware of the nature of its contents, and thereby put himself in the position of one who concealed himself from process.

§ 2467. Waiver of Notice.

If the defendant in contempt proceedings fails in the court of first instance to raise the question as to whether he had been given proper notice of the motion for attachment, such question is not available on appeal.⁴⁷

§ 2468. Technical Pleadings Unnecessary in Contempt Proceedings.

In contempt proceedings for the violation of an injunction technical pleadings are not required. It is sufficient that by petition, affidavit, or other showing, it is made to appear that there has been a willful violation of the court's order.⁴⁸ The essential thing is the filing of some statement or charge clearly showing the facts necessary to support the contempt proceedings.⁴⁹

§ 2469. Affidavit in Support of Motion.

The motion, application, or petition for an order to commit for contempt should be supported by an affidavit. The motion, or petition, and the affidavit are not infrequently combined into one pleading, and it is therefore sometimes stated that contempt proceedings are properly begun by affidavits.⁵⁰ This is entirely proper. All that is really necessary is that the application be made upon a duly

⁴⁷ *Christensen Eng. Co. v. Westinghouse etc. Co.* (C. C. A.; 1905) 68 C. C. A. 476, 135 Fed. 778. ⁴⁸ *U. S. v. Agler* (1894) 62 Fed. 824, 827.

⁴⁹ *Hammond Lumber Co. v. Sailors' Union* (1906) 149 Fed. 577, 580. ⁵⁰ *Employers' Teaming Co. v. Teamsters' Joint Council* (1905) 141 Fed. 686.

authenticated state of facts. The affidavit is the really important thing, in all cases where the contempt is not committed in the presence of the court; and if the affidavit is sufficient, the motion itself may be made orally.

§ 2470. Entitling Proceedings in Contempt Cases.

If contempt proceedings are instituted against a party to the suit, such proceedings are usually entitled as being in the main equity suit.⁵¹ If the proceedings are instituted against one who is not a party, the motion, petition, or information should likewise be entitled in the main cause; but when he has been attached or found guilty of the contempt, all orders thereafter made in that proceeding should be entitled as in a suit by the government.⁵²

U. S. v. Wayne (1801) Wall. Sr. 134, Fed. Cas. No. 16,654: A motion for an attachment in contempt was overruled because the proceeding was entitled as in a government suit. Said the circuit judge: "The law is, and so is the practice and reason of the thing, that proceedings against a party or some third person for a supposed contempt in the course of a cause must be entitled as in the civil cause: for until the rule is made absolute, or an attachment is issued, there is no suit between the United States and the person charged with a contempt. When the court have adjudged the party in contempt, they direct an attachment, and the future steps are all on the criminal side. Independent of the general propriety of this method, there is a special reason why the procedure should be as between the parties, until the contempt is established; namely, that the party charged may have his costs, if the motion is rejected or the rule refused. Were the United States made the prosecutor in the first instance, the vexation would be unredressed."

§ 2471. Contents of Motion or Petition to Commit.

The motion or petition to commit a person for violation of an injunction should specifically set forth the act or acts that are alleged to constitute the violation; and he cannot be found guilty of a violation of injunction in respect of acts not so set forth. The proceeding is in the nature of a criminal information and it must therefore be specific.⁵³ Technical precision and fullness, however, are not required. All that is necessary is that the person alleged to be in contempt should be sufficiently informed to enable him to make an

⁵¹ *Fischer v. Hayes* (1881) 6 Fed. 63.

⁵² *U. S. v. Anonymous* (1884) 21 Fed. 761; *Employers' Teaming Co. v. Teamsters' Joint Council* (1905) 141 Fed. 685.

⁵³ *Huttig Sash etc. Co. v. Fuelle* (1906) 143 Fed. 374; *Parkhurst v. Kinsman* (1848) Fed. Cas. No. 10,759.

intelligent defense, if he has any. It is not necessary to set out the charges with the same particularity as in an indictment.⁵⁴

If a petition for the issuance of an attachment for contempt in the violation of an injunction contains specifications of acts not covered by the injunction, such specifications may be stricken out on motion.⁵⁵

In considering whether the person who is alleged to be in contempt is sufficiently advised, by the proceedings instituted against him, as to the nature of the particular acts that constitute the contempt, reference is to be had not only to the motion, petition, or information, but also to the contents of the accompanying affidavits.⁵⁶

§ 2472. Nonparty Proceeded against as Party.

If the moving papers show a state of facts sufficient to justify punishing one for contempt who is not an actual party to the suit, the circumstance that those papers are erroneously framed with a view to punishing him as a party to the suit is not material. If the party is informed as to the nature of the charge he is to face, his status as a party or non-party is immaterial.⁵⁷

Employers' Teaming Co. v. Teamsters' Joint Council (1905) 141 Fed. 679: A petition for a rule on certain persons to show cause why they should not be adjudged in contempt and attached for violation of an injunction was in the form here indicated and was held good: The petition set up the filing of the bill in which it was prayed that the original defendants, and each and every of their agents and servants, and any and all other persons and associations, be restrained from interfering with, hindering, obstructing, or stopping any of the business of the plaintiff; and the petition made further reference to the prayer of the bill. It then recited the decree for an injunction (issued in the language of the bill). It proceeded further to set out what steps were taken to convey notice to everybody, including persons in the situation of respondents, and charged, upon information and belief, that respondents had actual knowledge of the decree and its terms. It then set out the several acts of the several respondents complained of, supporting the same by affidavits, and prayed that an order might be entered directing respondents severally to show cause by a short rule day why they should not severally be attached for contempt for violating "said temporary stay and injunctive order."

⁵⁴ *Employers' Teaming Co. v. Teamsters' Joint Council* (1905) 141 Fed. 685.

⁵⁵ *questioning In re Reese* (C. C. A.; 1901) 107 Fed. 942, 47 C. C. A. 87.

⁵⁶ *Hammond Lumber Co. v. Sailors' Union* (1906) 149 Fed. 579.

⁵⁷ *Employers' Teaming Co. v. Team-*

sters' Joint Council (1905) 141 Fed. 686, *questioning In re Reese* (C. C. A.; 1901) 47 C. C. A. 87, 107 Fed. 942.

§ 2473. Defense to Contempt Proceedings.

The person against whom contempt proceedings are instituted, whether by motion to commit or rule to show cause, is always entitled to be heard.⁵⁸ His defense is usually presented in a sworn answer or in affidavits replying to the information, motion, or petition presented by the party moving against him; and if the affidavits or answer of the respondent fully meet and explain the facts stated in the affidavits of the moving party or the verified petition on which the application is based, the attachment will not be granted.⁵⁹

§ 2474. Sufficiency of Defense.

The defense stated in the respondent's answer or in his affidavits should be such as to meet the case made by the party moving for his committal; and affidavits upon irrelevant and immaterial matters will be disregarded.⁶⁰

§ 2475. Mode of Proof.

On a motion to commit or at the hearing of a rule to show cause why a party should not be committed for contempt, the usual mode by which the facts are made to appear is by the use of affidavits.⁶¹ But the testimony may be more formally taken in the form of depositions or orally, if this appears advisable. The matter is in the discretion of the court.

§ 2476. Plaintiff's Right to Discovery.

In such a proceeding the plaintiff may, on filing interrogatories, have discovery from the defendant. The interrogatories should be confined to the matters specifically charged against the defendant in the motion for attachment.⁶² The defendant is privileged to refuse answering any interrogatory tending to incriminate him.⁶³

§ 2477. Reference to Master.

The taking of testimony on the question of a violation of injunction may be referred to a master with authority to report the

⁵⁸ *Fanshawe v. Tracy* (1868) 4 Biss. 397; *Universal Talking Mach. Co. v. Keen* (1905) 136 Fed. 456; *General Elec.*

⁵⁹ *Whipple v. Hutchinson* (1858) 4 Blatchf. 190. Fed. Cas. No. 17,517. *tric Co. v. McLaren* (1905) 140 Fed. 876.

⁶⁰ *Whipple v. Hutchinson* (1858) 4 Blatchf. 190. ⁶² *Parkhurst v. Kinaman* (1848) 2 Blatchf. 76, Fed. Cas. No. 10,759.

⁶¹ *Chisolm v. Caines* (1903) 121 Fed. ⁶³ *U. S. v. Debs* (1894) 64 Fed. 739.

testimony and his conclusions thereon.⁶⁴ A reference may also be ordered upon any other point material to be determined, as for instance, to ascertain whether the defendant was served with notice of the injunction.⁶⁵ Where the question whether an injunction has been violated is referred to a master, his finding will not be disturbed where the proof is conflicting. If such a reference is unsuccessfully prosecuted, the plaintiff will be charged with costs.⁶⁶

§ 2478. Burden and Quantum of Proof.

The fact of violation of the injunction must be clearly shown. The burden of proof is on the plaintiff, and the defendant is entitled to the benefit of any reasonable doubt. Substantially the same considerations here prevail in regard to the quantum of proof as obtain in criminal proceedings.⁶⁷ "The court must have more than a suspicion that the defendant has violated its injunction before it can hold him to be in contempt;"⁶⁸ and even "strong impressions" are not sufficient to warrant the fixing of liability for such offense.⁶⁹ A trivial and unintentional violation of an injunction by one who has tried in good faith to comply with the order will not be punished.⁷⁰

§ 2479. Weight of Defendant's Answer—Rule in Proceedings at Law.

The right of a party to purge himself of a contempt by his own oath has always been recognized both in courts of law and in courts of equity. But in regard to the weight to be attributed to the sworn answer of the respondent in contempt proceedings, a difference is to be noted between the practice of courts of law and courts of equity. In contempt proceedings at law, the rule has formerly been that the sworn answer of a respondent fully denying the facts on which the contempt proceedings are based is conclusive, and cannot be controverted by other evidence.⁷¹ If the respondent's answer is false, he

⁶⁴ *Hennessey v. Budde* (1897) 82 Fed. 541.

⁶⁵ *In re Schwarz* (1882) 14 Fed. 787.

⁶⁶ *Huttig Sash etc. Co. v. Fuelle* (1906) 143 Fed. 363.

⁶⁷ *California Paving Co. v. Moliter* (1885) 113 U. S. 609, 618, 28 L. ed. 1106, 1109, 5 Sup. Ct. 618; *Celluloid Mfg. Co. v. Chrolithian etc. Co.* (1885) 24 Fed. 585; *Woodruff v. North Bloomfield Gravel-Min. Co.* (1891) 45 Fed. 129; *Accumulator Co. v. Consolidated etc. Co.* (1892) 53 Fed. 793, 796.

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⁶⁸ *General Electric Co. v. McLaren* (1905) 140 Fed. 876, 879.

⁶⁹ *Cimiotti Unhairing Co. v. Frolloehr* (1903) 121 Fed. 561.

⁷⁰ *Edison Electric Light Co. v. Goelet* (1894) 65 Fed. 612.

⁷¹ *Matter of Pitman* (1852) 1 Curt. C. C. 186, Fed. Cas. No. 11,184; *In re Perkins* (1900) 100 Fed. 952; *Boyd v. Glucklich* (C. C. A.; 1902) 53 C. C. A. 451, 116 Fed. 142.

may be prosecuted for perjury, so it has been said, but on the question of the contempt the statements of the answer are to be taken as true.⁷² This singular and unreasonable doctrine has, however, lately been repudiated by the supreme court; and it seems that under the present practice at law the answer of a person charged with contempt is never conclusive within itself as to statements of facts contained in it, and the same may be inquired into in the usual way.⁷³ It has of course always been held that in order to be conclusive the answer must be credible and consistent in itself, and if a respondent states facts in his answer inconsistent with his avowed purpose and intention, the court is at liberty to draw its own inferences from the facts stated.⁷⁴

§ 2480. Same—Rule in Court of Equity.

The courts of equity have never conceded to the answer of the respondent the same conclusive character, for the purpose of purging the defendant of contempt, as was formerly allowed to it by courts of law. In courts of equity the rule is and always has been that the sworn answer of a party charged with contempt is evidence in his favor, but is not conclusive evidence. Consequently it may be contradicted and supported by other testimony, and the question whether or not the party charged with the contempt has exonerated himself is always to be decided upon a careful consideration of all the evidence produced for and against him.⁷⁵

§ 2481. Question Pretermitted to Final Hearing.

The court will not sustain a motion to punish a defendant for violating an injunction where the point whether the act complained of is within the injunctive order or not depends on a question that should clearly not be determined until the hearing on the merits.⁷⁶

§ 2482. Specific Acts Constituting Violation of Injunction.

A violation of injunction by the sale of infringing articles is sufficiently shown where the plaintiff's affidavits show that certain of

⁷² U. S. v. Dodge (1814) 2 Gall. 313. 21 Fed. 761, 768; U. S. v. Debs (1894)

⁷³ U. S. v. Shipp (1906) 203 U. S. 64 Fed. 724, 738; Boyd v. Glucklich (C. 574, 51 L. ed. 324. C. A.; 1902) 53 C. C. A. 451, 116 Fed.

⁷⁴ *In re* Edward S. May (1880) 1 Fed. 131, 142.

743.

⁷⁵ King v. Vaughan (1780) 2 Dougl. 743. ⁷⁶ International Register Co. v. Recording Fare Register Co. (1903) 125 K. B. 516; U. S. v. Anonymous (1884) Fed. 790.

the infringing articles were found in the hands of a consumer who stated that they were purchased of the defendant at a particular time subsequent to the granting of the injunction and the affidavits of the defendant do not deny that the sale was made.⁷⁷

An order restraining the defendants, members of a labor union, from boarding certain specified ships of the plaintiff and making threats against the seamen thereon is not violated by defendants doing those forbidden acts as against the crews of other ships belonging to the plaintiff.⁷⁸

§ 2483. Matters Not Available as Defenses—Irregularity or Impropriety of Injunction.

A defendant who has disobeyed an injunction cannot justify his disobedience by showing that the injunction was improvidently or erroneously granted. A person must not set an order of the court at naught merely because he thinks it wrong. He should abide by the order while it is in force, and meanwhile make efforts to get it rescinded, by motion to vacate or dissolve.⁷⁹ It is of no avail to the defendant to insist that the injunction, or injunctive order, is broader or more general in its prohibition than is warranted by the bill;⁸⁰ nor is it even sufficient to show that the injunction was based on a statute that turns out to be no law.⁸¹ If the defendant has

⁷⁷ *Christensen Eng. Co. v. Westinghouse etc. Co.* (C. C. A.; 1905) 68 C. C. A. 476, 135 Fed. 778.

Acts and conduct sufficient under particular conditions to amount to a violation of an injunction will be found indicated in the following cases: *Toledo etc. R. Co. v. Pennsylvania Co.* (1893) 54 Fed. 730, 19 L.R.A. 387; *Lake Erie etc. R. Co. v. Bailey* (1893) 61 Fed. 494; *United States v. Debs* (1894) 64 Fed. 724; *Stateler v. California Nat. Bank* (1896) 77 Fed. 43; *Mackall v. Ratchford* (1897) 82 Fed. 41; *Champaign Const. Co. v. O'Brien* (1901) 107 Fed. 333; *United States v. Weber* (1902) 114 Fed. 950; *United States v. Haggerty* (1902) 116 Fed. 510; *In re Fortunato* (1903) 123 Fed. 622; *In re Feeny* (1870) Fed. Cas. No. 4,715.

⁷⁸ *Hammond Lumber Co. v. Sailors' Union* (1906) 149 Fed. 579.

In the following cases, the act or conduct complained of was, under the particular circumstances, held not to constitute a violation of the injunction;

Mexican Ore Co. v. Mexican etc. Co. (1891) 47 Fed. 351; *Wakelee v. Davis* (1892) 50 Fed. 522; *Wong Wai v. Williamson* (1900) 103 Fed. 384; *General Elec. Co. v. McLaren* (1905) 140 Fed. 876; *Onslow County v. Tolman* (1906) 76 C. C. A. 317, 145 Fed. 753; *In re South Side R. Co.* (1874) Fed. Cas. No. 13,190.

⁷⁹ *In re Coy* (1888) 127 U. S. 731, 32 L. ed. 274; *Elliott v. Peirsol* (1828) 1 Pet. 340, 7 L. ed. 170; *Ex parte Watkins* (1830) 3 Pet. 193, 7 L. ed. 650; *U. S. v. Debs* (1894) 64 Fed. 724; *Ex parte Lennon* (1894) 12 C. C. A. 134, 64 Fed. 320; *U. S. v. Agler* (1894) 62 Fed. 824; *Roemer v. Newman* (1883) 19 Fed. 98; *Wells v. Oregon R. etc. Co.* (1884) 19 Fed. 20, 9 Sawy. 601; *Liddle v. Cory* (1865) 7 Blatchf. 1; *Whipple v. Hutchinson* (1858) 4 Blatchf. 190; *Callanan v. Friedman* (1900) 101 Fed. 321.

⁸⁰ *Economist Furnace Co. v. Wrought-Iron Range Co.* (1898) 86 Fed. 1010.

⁸¹ *U. S. v. Memphis etc. R. Co.* (1881) 6 Fed. 237, 240.

doubts as to the effect or scope of the order he should not disregard it, but should apply for a modification or for instructions.⁸²

§ 2484. Same—Dismissal of Cause on Merits.

The circumstance that the injunction was erroneously granted and that the bill is subsequently dismissed on the merits either in that court or in the appellate court does not deprive the court of its power to punish the violation of the injunction as a criminal offense and contempt of the court. But this circumstance may well prove operative on the discretion of the court in regard to such punishment. It has been held that when a suit is dismissed on the merits, the court should remit any fine not purely punitive, such as a fine in a patent infringement case made up of profits realized by the defendant from prohibited sales.⁸³

§ 2485. Same—Alleged Misunderstanding of Decree.

One who is a party to a suit and as such charged with notice of the orders of the court cannot excuse himself when brought up for violation of the injunction by saying that he was misinformed by hearsay as to the nature and extent of the order.⁸⁴ Nor do the courts take kindly the defense embodied in the suggestion that the defendant misconstrued the decree,⁸⁵ especially where its terms appear reasonably clear. A party cannot be permitted to construe the decree to suit himself. He is required to obey it both in the letter and in the spirit. It has been observed that those who undertake to see how near they can come to doing the prohibited act without rendering themselves liable, are very apt to overstep the bounds.⁸⁶ Nevertheless, if there seem to be reasonable grounds for the contention that the order was misunderstood, the court will forego the imposition of the punitive fine and limit its punishment to the assessment of compensatory damages and costs.⁸⁷

§ 2486. Same—Instructions of Superior.

It is no excuse for the violation of an injunction by a person occupying a subordinate position that he acted under the instructions

⁸² *Wells, Fargo & Co. v. Oregon etc.* (1884) 19 Fed. 20; *Rodgers v. Pitt Iron Range Co.* (1898) 86 Fed. 1011; (1898) 89 Fed. 424. ⁸⁶ *Economist Furnace Co. v. Wrought-Iron Range Co.* (1898) 86 Fed. 1011; *Craig v. Fisher* (1873) Fed. Cas. No. 3,332.

⁸³ *Worden v. Searls* (1887) 121 U. S. 3,332.

⁸⁴ 30 L. ed. 853, 7 Sup. Ct. 814.

⁸⁵ *Atchison etc. R. Co. v. Gee* (1905) 139 Fed. 582.

⁸⁶ *Economist Furnace Co. v. Wrought-Iron Range Co.* (1898) 86 Fed. 1010.

⁸⁷ *American Graphophone Co. v. Walcutt* (1898) 80 Fed. 468.

of a superior. As between the order of the court and the order of the individual the former must be followed.⁸⁸ That a defendant who is charged with the violation of an injunction acted under the advice of counsel is no defense, but the circumstance is one that may rightly be considered on the question of the extent of the punishment to be visited on him.⁸⁹

§ 2487. Same—New Matter Justifying Modification of Injunction.

If, subsequent to the granting of an injunction, new matter arises such as makes the continuance of the injunction inequitable or unjust, the party aggrieved should make an application for a modification of the injunction setting up such new matter. As long as the injunction remains he must obey it in the letter and in the spirit, and he acts at his peril in doing anything forbidden by the injunction.⁹⁰

1. *Muller v. Henry* (1879) 5 Sawy. 464, Fed. Cas. No. 9,916: The defendant had been enjoined from filling up and grading streets under a void authority derived from a certain board. After the issuance of this preliminary injunction the board proceeded to pass another ordinance not subject to the same defects as the former, authorizing the same work as before. The defendant thereupon proceeded, under this second authority, to do the acts that had been enjoined. It was held that he was liable for contempt in the violation of the injunction. Conceding that the new authority was lawful and sufficient, the proper way to proceed was by making application for a modification of the injunction. Said Sawyer, Circuit Judge: "The injunction should be obeyed until it is dissolved by the authority which granted it. Undoubtedly, if a proper showing were made, if the court were satisfied that the injunction should be dissolved, it would be dissolved; but until that is done, the party himself has no right to determine the fact that he has authority to proceed, in violation of the injunction of this court, to perform the acts which have been prohibited."

2. *Rodgers v. Pitt* (1898) 89 Fed. 424: After an injunction had been granted prohibiting the defendant from diverting the water of a river so as to deprive the plaintiff of a certain flow, the defendant acquired a new and independent title to a water right not in litigation in that suit, by virtue of which acquisition he insisted that he now had a better title to that water than the plaintiff. It was held that this gave him no ground for violating the preliminary innjunction in question. He should set up a new title and ask for a modification of the injunction. The court observed: "The defendant in this case was bound to obey the injunction, and, when he interfered with the court's order, he was acting at his peril. He certainly ought not to have acted upon his own judgment as to what his rights were, when it was manifest that his acts would, at least, amount to a

⁸⁸ *Sickels v. Borden* (1857) Fed. Cas. No. 12,833.

⁸⁹ *Ulman v. Ritter* (1896) 72 Fed. 1006.

⁹⁰ *Bowers v. Von Schmidt* (1898) 87 Fed. 293.

technical violation of the terms of the injunction. It was not for him to set up his own opinion as to the meaning and effect of the injunction."

§ 2488. Intention as Affecting Guilt of Contemnor.

A defendant who deliberately does the prohibited act will not be permitted to excuse himself by alleging that he had no intention to violate the injunction.⁹¹ "The belief, motive, or intent of the defendant not to violate the injunction does not excuse him if in fact his acts resulted in a violation of it. The breach of the injunction consists in doing the forbidden thing, and not in the intention with which it is done."⁹² The rule as to intention here is analogous to that which prevails in prosecution for crime: the intent required to be proven is not an intent to violate the law, or the order of the court, but to do the act that the law or order of the court forbids.⁹³

The absence of an intention to violate the injunction is relevant only on the question of the amount of punishment.⁹⁴

§ 2489. Total Want of Jurisdiction Available as Defense.

The rule prohibiting the party against whom contempt proceedings are instituted from questioning the propriety and regularity of the order granting the injunction applies in every case where the court acquires essential jurisdiction of the cause and does not exceed its powers. If a court has no power to grant an injunction in the first instance, its order is totally void; and the defendant cannot be punished for contempt in the violation of such injunction. Consequently it is always permissible to show, upon process of contempt, that the court granting the order had no jurisdiction of the suit; and if the court granting the injunction essays to punish a person for refusing to obey it, its action in this regard is subject to collateral attack upon habeas corpus proceedings in the appellate courts.⁹⁵

⁹¹ *Stateler v. California Nat. Bank* (1896) 77 Fed. 43. U. S. v. Keokuk (1867) 6 Wall. 514, 18 L. ed. 933; *Riggs v. Johnson County* (1867) 6 Wall. 166, 18 L. ed. 768;

⁹² *Rodgers v. Pitt* (1898) 89 Fed. 424, 429. *Pennsylvania v. Wheeling etc. Bridge Co.* (1855) 18 How. 421, 15 L. ed. 435; *Ex p. Rowland* (1882) 104 U. S. 604, 26 L. ed. 861; U. S. v. Agler (1894) 62 Fed. 824; U. S. v. Debs (1894) 64 Fed. 739; *American Lighting Co. v. Pub. Service Corp.* (1904) 134 Fed. 129; U. S. v. Atchison etc. R. Co. (1905) 142 Fed. 176; *Ex p. Robinson* (C. C. A.; 1906) 144 Fed. 835, 75 C. C. A. 663.

⁹³ *Economist Furnace Co. v. Wrought-Iron Range Co.* (1898) 86 Fed. 1011.

⁹⁴ *Atlantic Giant-Powder Co. v. Dittmar Powder Co.* (1881) 9 Fed. 316; *Pokegama etc. Co. v. Klamath River etc. Co.* (1898) 86 Fed. 538.

⁹⁵ *In re Ayers* (1887) 123 U. S. 443, 31 L. ed. 216; *In re Sawyer* (1887) 124 U. S. 200, 31 L. ed. 402; *Ex p. Terry* (1888) 128 U. S. 289, 32 L. ed. 405;

1. *Ex p. Fisk* (1885) 113 U. S. 713, 718, 28 L. ed. 1117, 1119, 5 Sup. Ct. 724, 728; "When, however, a court of the United States undertakes by its process of contempt to punish a man for refusing to comply with an order which that court had no authority to make, the order itself, being without jurisdiction, is void, and the order punishing for contempt is equally void. It is well settled now in the jurisprudence of this court that when the proceedings for contempt in such a case result in imprisonment, this court will, by its writ of habeas corpus, discharge the prisoner."

2. *In re Sawyer* (1888) 124 U. S. 200, 8 Sup. Ct. 482, 31 L. ed. 402: One Parsons, who claimed to have been elected police judge of a certain city, filed a bill in equity in the United States circuit court, praying for an injunction to restrain the mayor and councilmen of the city from proceeding further with certain charges against him, or taking any vote on the report of the committee declaring the office of police judge vacant, or appointing any person to fill that office. A temporary restraining order was issued accordingly, which the mayor and council failed to obey. They were cited for contempt, found guilty and adjudged to pay a fine and in default to stand committed to the custody of the marshal. On writ of habeas corpus the jurisdiction of the circuit court over the subject-matter of the suit was challenged. The supreme court held that the circuit court was without jurisdiction to entertain the bill and that consequently a person who disobeyed the restraining order was not subject to punishment as for a contempt. The court pointed out, however, that the mere fact that a court of equity assumes jurisdiction when there is a remedy at law does not deprive its injunction of full force and effect. In order to render the injunction void, the situation must be such that the court of equity has no jurisdiction whatever.

If a court has no jurisdiction at the time the restraining order is granted, the subsequent passage of a statute giving jurisdiction over such matters does not vitalize the original restraining order so as to enable the court to punish the defendant for a violation of the restraining order.⁹⁶

§ 2490. Collateral Attack on Jurisdiction Not Permitted.

If jurisdiction is sufficiently made to appear in the pleadings, and there is nothing in the record to show a lack of jurisdiction on the part of the court, one who is brought up in contempt proceedings cannot, upon habeas corpus, show that the jurisdiction did not exist. Parties to such a collateral proceeding are bound by the jurisdictional averments in the main suit.⁹⁷

⁹⁶ *U. S. v. Atchison etc. R. Co.* (1905) 41 L. ed. 1112; *W. B. Conkey Co. v. Russell* (1901) 111 Fed. 417.

⁹⁷ *In re Lennon* (1897) 166 U. S. 553,

§ 2491. Recitals of Order.

An order or decree adjudging one to be in contempt for the violation of an injunction and imposing a punishment therefor need not recite that the injunction which was violated was a lawful one.⁹⁸

Where the act constituting the violation of an injunction is set forth with sufficient particularity in the affidavit and other papers, the order adjudging the defendant to be guilty of the "contempt alleged" is sufficient without defining the act more specifically. All that is necessary is that the various proceedings and orders should be so related and connected as to determine, by reference, the meaning of the general expression.⁹⁹

Punishment of Contempt.

§ 2492. No Suspension of Punishment Allowed.

The order imposing a fine or ordering imprisonment for the violation of an injunction need not, and ordinarily will not, be suspended until the final disposition of the cause. The person on whom such punishment is laid has his immediate right of appeal, and he is therefore in no position to insist on the suspension of the order.¹⁰⁰

§ 2493. Punishment by Fine or Imprisonment.

Upon adjudging a party to be guilty of a contempt, the court has authority to impose a punishment consisting either of a fine or of imprisonment.¹⁰¹ It cannot impose a punishment consisting of both a fine and imprisonment; but where an order imposes both penalties, the offender is not entitled to his discharge, until he has satisfied at least one of the penalties, by either paying the fine or undergoing the imprisonment imposed by the court.¹⁰²

The order imposing the penalty may be in the alternative, or it may be drawn conditionally, as that the party shall be committed to prison unless by a certain day he shall pay the stated fine. In such case there is no commitment or imprisonment if the fine is paid, and the penalties are not cumulative.¹⁰³

⁹⁸ *Fischer v. Hayes* (1881) 6 Fed. 63.

⁹⁹ *Fischer v. Hayes* (1881) 6 Fed. 63, 70.

¹⁰⁰ *Westinghouse Air Brake Co. v. Christensen Engineering Co.* (1903) 123 Fed. 632. See *Gould v. Sessions* (1895) 67 Fed. 163, 14 C. C. A. 366.

¹⁰¹ *Ex p. Robinson* (1873) 19 Wall. 505, 22 L. ed. 205; *U. S. v. Atchison etc.* R. Co. (1883) 16 Fed. 853; *In re Boone* (1897) 83 Fed. 948; *U. S. v. Green* (1898) 85 Fed. 859.

¹⁰² *Ex p. Davis* (1901) 112 Fed. 139.
¹⁰³ *Fischer v. Hayes* (1881) 6 Fed. 71.

§ 2494. Fine against Corporation—Voluntary Society.

A fine may be awarded against a corporation, and the court is not confined to the remedy against the corporate officers.¹⁰⁴ But the officers can of course be punished also.¹⁰⁵

In contempt proceedings for the violation of an injunction granted against a voluntary association of workmen and individuals who are members of it, a fine cannot be assessed against the association itself, though it is specially named as a defendant, and its officers formally put in an appearance for it.¹⁰⁶

§ 2495. Criminal and Civil Element in Fine.

In assessing a fine for the violation of an injunction two quite different factors frequently have to be taken into consideration, namely, (1) the vindication of the court and its process, and (2) the compensation of the party injured by the violation of the injunction. The first factor is of a purely criminal or punitive character. Where the person alleged to be in contempt is not an actual party to the suit nor a confederate with such, but is attached simply for obstructing the process of the court, the proceeding is wholly criminal and the compensatory element cannot be involved. But where the alleged contemnor is a party to the suit, the proceedings partake both of a punitive and civil character and both elements may well be taken into consideration in assessing the fine. Accordingly it will be found that the courts in this latter class of cases frequently assess part of the fine as a criminal penalty and the other part as compensatory damages in favor of the party aggrieved. It will thus be seen that in so far as the adjudication of a fine imposes a penalty in favor of the government, it is a criminal judgment; and in so far as it imposes a fine in favor of the adverse party in reparation for his loss and damage, it is a civil judgment.¹⁰⁷

¹⁰⁴ *U. S. v. Memphis etc. R. Co.* (1881) 6 Fed. 237. individual officers were not mentioned, but it appeared that they were in court

¹⁰⁵ *American Construction Co. v. Jacksonville etc. Co.* (1892) 52 Fed. 937: In a suit against a railroad company an injunction had been granted restraining said company, its officers, agents, attorneys, servants, and employees, from doing certain acts. A motion for an attachment for violation of the injunction specified the company and its officers as the offenders, and prayed an attachment against them. The names of the

in that cause. An objection to the motion on the ground that it did not specify the names of the individual officers was overruled, since a proper order for the attachment could be made from the record.

¹⁰⁶ *Allis-Chalmers Co. v. Iron Molders' Union* (1906) 150 Fed. 155, 184.

¹⁰⁷ *In re Chiles* (1874) 22 Wall. 168, 22 L. ed. 822.

§ 2496. Mode of Review in Appellate Court.

This discrimination between the two factors involves the further principle that, in so far as the judgment is civil and contemplates the giving of compensatory damages, it is subject to review on appeal in the equity suit; while in so far as it is punitive, it is subject to review only by writ of error. The strict application of this rule would, however, be found to operate with inconvenience, inasmuch as it would not be practicable nor desirable to resort to the separate methods of procedure in a case where the fine involves both elements. Consequently it is held that where the fine in a given case embraces both elements, it may be reviewed as to the compensatory feature even on a writ of error. In other words, whatever the method adopted is, there should not be a partial review.¹⁰⁸

§ 2497. Considerations Affecting Amount of Compensatory Fine.

In assessing a compensatory fine the court has ample discretion. It may, if it sees fit, award a round sum, not based on any proved items of loss or expense, but intended roughly to cover probable loss and expenses. It has been held that when a fine is imposed by way of indemnity, it should not exceed the actual loss incurred by the violation of the injunction, including the expenses of the proceedings necessitated in presenting the offense for the judgment of the court. And there should usually be some evidence before the court as to what those expenses are.¹⁰⁹ For specific instances where the courts have awarded the whole or a part of the fine to the injured party, and for illustrations of the amounts that have been considered proper under different circumstances, the reader is referred to the cases cited below.¹¹⁰ The court will order a reference to ascertain the loss, expense, or injury suffered by the plaintiff by reason of the violation of the injunction, if this course seems desirable.¹¹¹

¹⁰⁸ *Matter of Christensen Eng. Co. Sewing Machine Co.* (1881) 9 Fed. 698; (1904) 194 U. S. 458, 48 L. ed. 1072; *In re Tift* (1881) 11 Fed. 463; *Searls v. Christensen Eng. Co. v. Westinghouse Worden* (1882) 13 Fed. 716; *In re North etc. Co.* (C. C. A.; 1905) 135 Fed. 781, *Bloomfield etc. Co.* (1881) 27 Fed. 795; 68 C. C. A. 476. *Indianapolis Water Co. v. American etc. Co.* (1896) 75 Fed. 972; *Callanan v. Friedman* (1900) 101 Fed. 321; *Cary* 135 Fed. 782, 68 C. C. A. 476 (*modifying* *Mfg. Co. v. Acme etc. Co.* (1901) 108 Fed. 873, 48 C. C. A. 118; *Indianapolis etc. Co. v. Consolidated Traction Co.* (1903) 125 Fed. 247).

¹⁰⁹ *Christensen Eng. Co. v. Westinghouse Air Brake Co.* (C. C. A.; 1905) 135 Fed. 782, 68 C. C. A. 476 (*modifying* (1904) 130 Fed. 735).

¹¹⁰ *Doubleday v. Sherman* (1870) 8 Blatchf. 45, Fed. Cas. No. 4,020; *Ready Roofing Co. v. Taylor* (1878) 15 Blatchf. 94, Fed. Cas. No. 11,613; *In re Mullee* (1869) 7 Blatchf. 23; *Macaulay v. White*

¹¹¹ *Wells, Fargo & Co. v. Oregon etc. R. Co.* (1884) 19 Fed. 20.

§ 2498. Disposition of Compensatory Fine.

Where a compensatory fine is assessed it will be ordered to be paid to the clerk for the use of the plaintiff.¹¹²

§ 2499. Discretion as to Amount of Punitive Fine.

The amount of the punitive fine that should be assessed in favor of the government against a party violating an injunction is much more largely a matter of pure discretion than is the amount of the fine assessable in favor of the injured party for purposes of indemnification only. As there is no strict criterion for determining the amount of the punitive fine, the action of the court of first instance will rarely be reviewed, and never unless the amount is clearly excessive.¹¹³

§ 2500. Disposition of Compensatory and Punitive Fines on Appeal.

A compensatory fine assessed in the circuit court must be remitted, when the case is taken up on appeal and the appellate court decides against the right of the plaintiff on the case made in the bill. But the punitive fine assessed as a punishment for the contempt in its criminal aspect will be allowed to stand; or the lower court will be permitted on remandment of the cause to impose such fine, in its discretion.

Worden v. Searls (1887) 121 U. S. 14, 30 L. ed. 853, 7 Sup. Ct. 814: In a suit for the infringement of a patent a preliminary injunction had been granted. The defendant was then brought up for a violation thereof and a fine was imposed on him. Upon appeal the supreme court reversed the decree and directed that the bill be dismissed. The contempt proceedings in the lower court were taken and entitled in the main suit, and the fine assessed against the defendant for contempt was chiefly composed of an item consisting of profits obtained by the defendant from the prohibited sales. The supreme court held that as this item was an incident of the suit the right of the plaintiff to recover the same was dependent on the right to the injunction. Hence, as the supreme court had found against the plaintiff on this issue, he could not recover that part of the fine. Accordingly, the judgment in respect to the fine was reversed, without prejudice to the right of the lower court to punish the contempt as respects its criminal character.

§ 2501. Nominal Damages.

Where the violation of the injunction is merely technical and the proceedings are brought only to test the legal right, nominal damages have been allowed.¹¹⁴ Such damages are also sometimes awarded

¹¹² *Economist Furnace Company v. Westinghouse Air Brake Co.* (C. C. A.; Wrought-Iron Range Co. (1898) 86 Fed. 1905) 68 C. C. A. 476, 135 Fed. 780. 1010.

¹¹³ *Christensen Engineering Co. v. R. Co.* (1898) 132 Fed. 582. See *Rogers*

¹¹⁴ *Central Trust Co. v. Wabash etc.*

when the violation was not deliberately committed but was due to ignorance or mistake.¹¹⁵

§ 2502. When Compensatory Damages Alone Allowed.

Where the party violating an injunction is guilty of no bad faith punitive damages will not be assessed, though compensatory damages may be awarded.¹¹⁶ But a guilty party will always be charged with the actual costs.¹¹⁷

§ 2503. Mitigating Circumstances.

That the contemnor acted upon advice of counsel in doing an act that amounts to violation of an injunction is not a good technical defense to the contempt proceedings,¹¹⁸ but inasmuch as the matter of fixing the punishment is within the discretion of the court, the consideration that the party accused of the contempt acted honestly and under the *bona fide* advice of competent counsel is usually given a just and proper weight. It goes of course to mitigate.¹¹⁹ The circumstance that the accused acted in entire good faith is especially cogent in case of those who occupy fiduciary relations and who therefore are in no position to be personally benefited by the alleged violation of injunction.¹²⁰

§ 2504. Authority of President to Pardon and Remit Punishment.

A person adjudged guilty of a criminal contempt in disobeying an injunction may be pardoned by the President, and his fine or other punishment remitted.¹²¹ But in so far as the punishment is imposed by the court in respect of the civil wrong, and for the benefit of the party intended to be protected by the injunction, it does not fall within the pardoning power of the President, but remains exclusively within the control of the court by which the punishment was imposed.¹²²

v. Pitt (1898) 89 Fed. 425, 430; *Dinsmore v. Louisville etc. R. Co.* (1890) 3 Fed. 593.

¹¹⁵ *Morss v. Domestic Sewing-Mach. Co.* (1889) 38 Fed. 482.

¹¹⁶ *Champlain Construction Co. v. O'Brien* (1901) 107 Fed. 333; *Indianapolis etc. Traction Co. v. Consolidated Traction Co.* (1903) 125 Fed. 247, 250.

¹¹⁷ *Comly v. Buchanan* (1897) 81 Fed. 58.

¹¹⁸ *Atlantic Giant Powder Co. v. Dittmar Powder Co.* (1881) 9 Fed. 316; *Ulman v. Ritter* (1896) 72 Fed. 1000.

¹¹⁹ *Pokegama Sugar-Pine Lumber Co.*

v. Klamath River Lumber etc. Co. (1898) 86 Fed. 538; *Callanan v. Friedman* (1900) 101 Fed. 321; *Dinsmore v. Louisville etc. R. Co.* (1890) 3 Fed. 593; *Carstaedt v. United States Corset Co.* (1876) Fed. Cas. No. 2,468.

¹²⁰ *Vose v. Internal Imp. Fund* (1875) 2 Woods 647, Fed. Cas. No. 17,008.

¹²¹ *In re Mullee* (1869) Fed. Cas. No. 9,911, 7 Blatchf. 23; *Fischer v. Hayes* (1881) 6 Fed. 63.

¹²² *In re Nevitt* (C. C. A.; 1902) 117 Fed. 453, 54 C. C. A. 622; *Fischer v. Hayes* (1881) 7 Fed. 96; *Hendryx v. Fitzpatrick* (1884) 19 Fed. 811.

CHAPTER LXI.

RECEIVERS.

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*Receivership in General.***§ 2505. Receiver Defined.**

A receiver is an officer of the court through whom the court, by virtue of its jurisdiction, equitable or statutory, takes possession of

any property that may be the subject of a suit, preserves it from waste or destruction, secures and collects the proceeds, and ultimately disposes of the same according to the rights of those entitled thereto, whether they are regular parties in the cause or whether they only come before the court upon petition, in seasonable time and in due course of proceeding, to assert and establish their claims.¹ In the English practice, when a person is appointed for the purpose of conducting or superintending a business, as well as for the purpose of receiving and holding property, he is denominated a manager or a receiver and manager.² But according to the usage in America, a person is called a receiver whether he is appointed for the purpose of holding property or for the further purpose of conducting an enterprise, such as is involved in the operation of a railroad.³

The appointment of a receiver constitutes one of the most effective, not to say drastic, remedies known to chancery proceedings. It is exclusively a conservative remedial process. In this respect it is unlike the remedy of injunction. Injunction is a head of equitable relief, as well as a remedial process, and an injunction may be made a feature of the final decree, but receivership proceedings necessarily terminate when the suit is at an end and when the property that is the subject matter of the suit has been rightly disposed of under the orders of the court.

§ 2506. Power of Court to Appoint Receiver.

The authority to appoint a receiver resides in all courts exercising equity powers and having jurisdiction of any property that needs to be preserved pending a litigation. As regards the federal courts, the authority is most commonly exercised by the circuit court, as a court of first instance, but in a proper case the appellate court may also exercise the power. However, the supreme court will not appoint a receiver, on appeal, during the pendency of a foreclosure suit in that court, except under unusual conditions.⁴

¹ See 23 Am. & Eng. Enc. of Law (2d ed.) p. 1000; *Beverley v. Brooke* (1847) 4 Gratt. 187, 208. *timore Building etc. Ass'n v. Alderson* (1900) 39 C. C. A. 609, 99 Fed. 489, 495.

The suggestion that a receivership is an office and that the receiver is an officer of the court is not to be taken too literally. It has been observed that a receivership is more in the nature of a condition than an office. It is a means by which the court of equity protects property taken into its custody, and the office of a receiver (if it can properly be called an office) exists whenever and wherever the appointment is made. *Bal-*

² 3 Dan. Ch. Pr. 462.

³ The term commissioner has sometimes been used to indicate the person or officer who is appointed with the powers of a receiver to take possession of property pending a litigation. See *Gunn v. Ewan* (C. C. A.; 1899) 93 Fed. 80, 35 C. C. A. 213.

⁴ *Pacific Railroad Co. v. Missouri-Pacific Railroad* (1877) 95 U. S. 1, 24 L. ed. 347.

§ 2507. Nature and Scope of Receivership Proceedings.

The nature and functions of the office of receiver have been so often and so fully described by the courts, in judicial opinions, that there is no propriety in attempting any new and original account of it here. The following cases and the quotations made from the opinions therein of the several courts will be ample for our purposes.

1. *Booth v. Clark* (1854) 17 How. 331, 15 L. ed. 167: Mr. Justice Wayne described some of the chief characteristics of the office of receiver in the following words, which have been judicially quoted many times: "A receiver is an indifferent person between parties, appointed by the court to receive the rents, issues, or profits of land, or other thing in question in this court, pending the suit, where it does not seem reasonable to the court that either party should do it. . . . He is an officer of the court; his appointment is provisional. He is appointed in behalf of all parties, and not of the complainant or of the defendant only. He is appointed for the benefit of all parties who may establish rights in the cause."

2. *Davis v. Gray* (1872) 16 Wall. 217, 21 L. ed. 452: In the course of a brief and accurate disquisition on the nature of the office of receiver, Mr. Justice Swayne said: "A receiver is appointed upon a principle of justice for the benefit of all concerned. Every kind of property of such a nature that, if legal, it might be taken into execution, may, if equitable, be put into his possession. Hence the appointment has been said to be an equitable execution. He is virtually a representative of the court, and of all the parties in interest in the litigation wherein he is appointed. He is required to take possession of property as directed, because it is deemed more for the interests of justice that he should do so than that the property should be in the possession of either of the parties in the litigation. He is not appointed for the benefit of either of the parties, but of all concerned. Money or property in his hands is *in custodia legis*. He has only such power and authority as are given him by the court and must not exceed the prescribed limits. The court will not allow him to be sued touching the property in his charge, nor for any malfeasance as to the parties, or others, without its consent; nor will it permit his possession to be disturbed by force, nor violence to be offered to his person, while in the discharge of his official duties."

3. *Beverly v. Brooke* (1847) 4 Gratt. 208: "The receiver appointed is the officer and representative of the court, subject to its orders, accountable in such manner and to such persons as the court may direct, and having in his character of receiver no personal interest but that arising out of his responsibility for the correct and faithful discharge of his duties. It is of no consequence to him how, or when, or to whom, the court may dispose of the funds in his hands, provided the order or decree of the court furnishes to him a sufficient protection. The order of appointment is in the nature, not of an attachment, but a sequestration: it gives in itself no advantage to the party applying for it over other claimants; and operates prospectively upon rents and profits which may come to the hands of the receiver, as a lien in favor of those interested, according to their rights and priorities in or to the principal subject out of which those rents and profits issue. In the exercise of this summary jurisdiction, a court of equity reverses, in a great measure, its ordinary course of administering justice; beginning at the end, and levying upon the property a kind of equitable execution, by which it

makes a general instead of a specific appropriation of the issues and profits, and afterwards determining who is entitled to the benefit of its *quasi* process. But acting, as it often must of necessity, before the merits of the cause have been fully developed, and not unfrequently when the proper parties in interest are not all before the court, it proceeds with much caution and circumspection, in order to avoid disturbing unnecessarily or injuriously legal rights and equitable priorities."

§ 2508. General and Special Receivers.

A general receiver is appointed to take charge of all the property of the defendant within the jurisdiction. The special receiver⁵ is one who is appointed to take charge of the particular property in litigation, less than the whole estate of the debtor. A receiver in foreclosure proceedings is a special receiver where the mortgage does not cover all the debtor's property.⁶ A special receiver is sometimes appointed in a proceeding where there is also a general receiver. In a case where a general receiver had been appointed for a corporation, a special receiver was appointed to sue for and collect obligations which were due exclusively to the creditors and which were of such nature that they could not be enforced by the general receiver of the corporation.⁶

§ 2509. Temporary and Permanent Receivers.

Receivers are also either temporary or permanent. Temporary receivers are sometimes appointed, where large interests are involved, to act until permanent receivers are chosen and put in charge. The temporary receiver will usually be continued as permanent receiver unless good reason to the contrary appears.⁷

Instead of naming one as a temporary receiver, a procedure that requires subsequent affirmative action on the part of the court to constitute him permanent receiver, the device has sometimes been adopted of appointing the receiver as such without qualification in the first instance but reserving leave for any interested party to appear within a limited time and object to the appointment. If no objection is made within that time the appointment becomes final, of course, without further action on the part of the court. The practical effect of such a reservation is to make the appointment temporary in its nature.⁸

⁵ *Central Trust Co. v. Worcester Cycle Mfg. Co.* (1902) 114 Fed. 659.

⁷ *Bowling Green etc. Co. v. Virginia etc. Co.* (1904) 133 Fed. 186.

⁶ *Hale v. Hardon* (C. C. A.; 1899) 37 C. C. A. 240, 95 Fed. 770. See *Hale v. Allinson* (1903) 188 U. S. 61, 47 L. ed. 385.

⁸ *Farmers' Loan etc. Co. v. Cape Fear etc. R. Co.* (1894) 62 Fed. 675, 676.

§ 2510. Judicial Discretion as to Appointment of Receiver.

The question whether a receiver shall be appointed or not in any particular case is a matter within the sound discretion of the court, and the action of a court of first instance in disposing of such an application will not be reversed on appeal except upon a showing of a manifest abuse of discretion.⁹ But while the appointment of a receiver is said to be a matter of judicial discretion, this discretion is not arbitrary or absolute. It is a matter of sound judicial discretion to be exercised for the purpose of protecting the rights of all the parties in respect to the property in controversy;¹⁰ and when called upon to make such an order, the court will take care not to interfere unduly with the rights of any person holding a prior legal interest in the property.¹¹

§ 2511. Consent of Parties Not Conclusive.

A receiver will not be appointed merely because all the parties in interest agree that such step should be taken. The court will consider for itself whether it has the proper jurisdiction, and in the exercise of its own discretion will determine whether the situation is such as to warrant the appointment of a receiver.¹²

§ 2512. Considerations Bearing on Exercise of Judicial Discretion.

Each case must be determined upon its own conditions and circumstances. In exercising the power of appointing a receiver, the courts should ever keep in mind that the receivership, like the injunction, is an extraordinary remedy, and that such a proceeding ought never to be instituted except in cases of necessity, and upon a clear and satisfactory showing that an emergency exists, such as makes the appointment of a receiver requisite in order to protect the interests of one or more of the parties to the controversy. The power of appointing receivers is one that should be sparingly exercised, and with great caution and circumspection.¹³

⁹ *Sage v. Railroad Co.* (1888) 125 U. S. 361, 376, 31 L. ed. 694, 698, 8 Sup. Ct. 891; *Briggs v. Neal* (C. C. A.; 1903) 120 Fed. 224, 56 C. C. A. 572; *Vose v. Reed* (1871) 1 Woods 647, Fed. Cas. No. 17,011.

¹⁰ *Moore v. Bank* (1901) 106 Fed. 574.

¹¹ *Wiswall v. Sampson* (1852) How. 64, 14 L. ed. 327.

¹² *Hutchinson v. American Pal. Car Co.* (1900) 104 Fed. 182, 185.

¹³ *Ford v. Taylor* (1905) 137 Fed. 149; *Pullan v. Railroad Co.* (1865) 4 Biss. 35, 47, Fed. Cas. No. 11,461; *Latham v. Chafee* (1881) 7 Fed. 526, and authorities there cited.

Illustrations of conditions justifying appointment of receiver: *Naumburg v. Hyatt* (1885) 24 Fed. 898; *Ulman v.*

A well-grounded apprehension of immediate loss is necessary to justify the court in appointing a receiver. A remote, doubtful, or past danger is not sufficient.¹⁴ The appointment of a receiver looks to conservation or protection in the future, not in the past.¹⁵ The fact that the subject-matter of the suit is of a perishable nature is a circumstance that will sometimes make the appointment of a receiver a proper step.¹⁶

§ 2513. Receivership Must Be Necessary.

A receiver will not be appointed where the plaintiff's interests can be adequately protected by legal proceedings in the same or in another court.¹⁷ Where the mere *lis pendens* is sufficient fully to protect the plaintiff as regards his rights in the property, a receivership will be denied.¹⁸ Nor will a receiver be appointed where the rights and equities alleged to be in danger can be adequately protected by the efforts of the party interested without recourse to any legal proceedings; and the circumstance that the course by which this may be accomplished is somewhat inconvenient will not justify the granting of an order for a receiver.¹⁹

§ 2514. No Receiver upon Mere Dispute as to Title of Property.

A receiver will not ordinarily be appointed merely as custodian of the naked legal possession of property, the title to which is in dispute, there being no possibility of anything being done by him to manage, improve, or preserve it. The absence of a necessity for a receivership in such case is a sufficient reason for denying the application. No good purpose could be subserved by the appointment of a receiver under such conditions.²⁰ The existence of a disputed

Clark (1896) 75 Fed. 868; Pacific Northwest etc. Co. v. Allen (C. C. A.; 1901) 109 Fed. 515, 48 C. C. A. 521; Universal Sav. etc. Co. v. Stoneburner (C. C. A.; 1902) 51 C. C. A. 208, 113 Fed. 251; Clark v. Brown (C. C. A.; 1902) 57 C. C. A. 76, 119 Fed. 130.

Illustrations of conditions insufficient to justify appointment of receiver: Union Mut. Life Ins. Co. v. Union Mills Plaster Co. (1889) 37 Fed. 286, 3 L.R.A. 90; Buckeye Engine Co. v. Donau Brewing Co. (1891) 47 Fed. 6; Lancaster v. Asheville St. R. Co. (1898) 90 Fed. 129; Taylor v. Decatur etc. Co. (1901) 112 Fed. 499; Joseph Dry Goods Co. v. Hecht (C. C. A.; 1903) 57 C. C. A. 64, 120 Fed. 760.

¹⁴ Beecher v. Bininger (1870) 7 Blatchf. 170, Fed. Cas. No. 1,222; Lancaster v. Asheville St. R. Co. (1898) 90 Fed. 129, 133.

¹⁵ Kelley v. Boettcher (1898) 89 Fed. 125, 130.

¹⁶ Crane v. McCoy (1860) 1 Bond 422, Fed. Cas. No. 3,354.

¹⁷ Wanneker v. Hitchcock (1889) 38 Fed. 383.

¹⁸ Jones v. Smith (1889) 40 Fed. 314.

¹⁹ Overton v. Memphis etc. R. Co. (1882) 10 Fed. 866.

²⁰ St. Louis etc. R. Co. v. Dewees (1885) 23 Fed. 519.

equitable right to property is not, generally speaking, a sufficient basis of title to justify the court, at the instance of the holder of such equity, in taking possession and control from the holder of the legal title and putting the same in the hands of a receiver.²¹

§ 2515. Insolvency of Defendant.

The insolvency of a defendant in possession of the property in controversy does not alone justify the appointment of a receiver. The plaintiff must also show a probable right in himself, and that the rents or the corpus are in danger of being lost or impaired.

Ryder v. Bateman (1898) 93 Fed. 28: Hammond, J. said: "The bearing of the fact of insolvency is often misunderstood on an application for a receiver, and often, erroneously, it is supposed to be controlling. An insolvent party has the same right as another to enjoy his own until a better title is displayed. If a plaintiff sets up a case where the defendant is under some sort of obligation to pay over the rents to some one else, and he be insolvent, that fact might be controlling, perhaps; but not if he claims as owner, and is in possession and enjoyment as owner, absolutely. Then, if his right of ownership be challenged, the plaintiff must show something more than the challenge, to be entitled to a receiver pending the litigation. He must show a probably better right of ownership, otherwise insolvency is quite immaterial. If the corpus be in danger, there might be a better claim against an insolvent in possession of disputed property."

§ 2516. Relative Inconvenience to Respective Parties.

In passing upon the propriety of making an order for the appointment of a receiver, the court will always take into consideration the relative damage that might be expected to follow to the respective parties from the granting or withholding of the order. If the case be such that greater injury would ensue to one of the parties from the appointment of a receiver than would accrue to the other from withholding it, the order may be denied. Under the other hand, if the granting of the receivership will protect the applicant without doing material damage to the other party, the order may properly be granted.²² A receiver will be appointed where the defendant is irresponsible, and it appears that if the plaintiff were to establish his right to the fund in controversy his suit might be rendered fruitless by the act of the defendant in absconding.²³

²¹ *Schenck v. Peay* (1868) 1 Woolw. 175; *Overton v. Memphis etc. Co.* (1882) 10 Fed. 866.

²² *Vose v. Reed* (1871) Fed. Cas. No. 17,011; *Tysen v. Wabash R. Co.* (1878) Fed. Cas. No. 14,315.

²³ *Parkhurst v. Kinsman* (1848) 2 Blatchf. 78, Fed. Cas. No. 10,760. See *Lenox v. Notrebe* (1833) Hempst. 225, Fed. Cas. No. 8,246b.

§ 2517. Equity of Plaintiff's Cause as Affecting Appointment of Receiver.

The appointment of a receiver will not be granted where it does not appear that the plaintiff will probably prevail in the suit.²⁴

Kelley v. Boettcher (1898) 89 Fed. 125: Thayer, Circuit Judge, stated some of the considerations that govern the court in regard to the granting of an application for a receiver thus: "A sound rule which ought to be observed on such preliminary hearings is that the court should determine whether it is probable that on the final hearing of the case the allegations of the bill will be made good by competent proof, and whether the character and situation of the property is such that it ought to be taken into judicial custody in the meantime, for the purpose of preserving the rights of all parties in interest. If, upon a careful consideration of the pleadings and other moving papers, there is a strong probability of ultimate recovery, and the character of the property is such that it may deteriorate in value before there can be a full and final investigation of the case, the right and duty of the court to appoint a receiver is clear. The converse of this proposition must also be true, that if a recovery on final hearing seems doubtful, or if it is probable that the property in controversy will not suffer any deterioration in value prior to that time, or if the defendants have been in the undisturbed possession of the property for a number of years under an apparently good title, and are solvent and abundantly able to respond for any injury that may be done to it, as well as for any profits that may be derived therefrom after the application for a receiver is preferred, then a receiver ought not to be appointed. Adequate reasons should exist and be shown in all cases to warrant a court in depriving parties of the possession of property to which they have a good record title, and of which they have had peaceful possession for a series of years. All of the presumptions of law are in their favor."

§ 2518. Laches in Prosecution of Suit.

Delay in bringing on the hearing of the motion for a receiver may be sufficient of itself to justify a refusal of the motion. The lapse of six years from the filing of the bill is more than enough for this purpose.²⁵

§ 2519. Reluctance of Courts to Appoint Managing Receiver.

The courts are extremely reluctant to appoint a receiver—or at least they have always pretended to be—when the taking of such step would make it necessary for the court to undertake the management and conduct of a business enterprise. "It is not the province of a court of equity," so it has been said, "to take possession of the property and conduct the business of corporations or individuals, except

²⁴ *Moore v. Bank of British Columbia* (1901) 106 Fed. 574.

²⁵ *Hood v. First Nat. Bank* (1886) 29 Fed. 55.

where the exercise of such extraordinary jurisdiction is indispensably necessary to save or protect some clear right of a suitor, which would otherwise be lost or greatly endangered, and which cannot be saved or protected by any other action or mode of proceeding."²⁶

§ 2520. Appointment of Managing Receiver for Public Corporation.

Undoubtedly receiverships were first instituted merely for the purpose of taking possession of the property that was the subject-matter of the suit and of preserving it from deterioration, or selling and disposing of it, so that in the end the property itself or its proceeds might be distributed as the rights of the litigating parties should appear; and the management of a business was not understood to be any proper incident of the proceedings. But the exigencies of modern business have brought the courts in great measure away from this idea; and as a consequence we find them assuming from time to time the responsibility of appointing a managing receiver. They were first brought to this necessity in cases of railroad receiverships. These corporations are of a public character, and the public interests require that they should be operated continuously without regard to the vicissitudes that may overtake any particular management. As a consequence the federal courts nowadays never hesitate to appoint a receiver in railroad foreclosure cases and in other suits requiring the appointment of a receiver; and when a receiver is thus appointed, the railroad is operated during the pendency of the suit by the court acting through its receiver. Still it is said that the appointment of a receiver to manage and conduct such an enterprise involves the exercise of a power that can be justified only in case of absolute necessity.²⁷

§ 2521. Appointment of Managing Receiver for Private Business.

A managing receiver of an ordinary business enterprise, not of a public character, whether it be owned by an individual or by a corporation, will be appointed in a rare case only. One deterrent consideration is the responsibility of the thing; and, where a corporation

²⁶ *Overton v. Memphis & Little Rock R. Co.* (1882) 10 Fed. 866, 867.

²⁷ *Milwaukee etc. R. Co. v. Soutter* (1864) 2 Wall. 510, 17 L. ed. 900; *Farmers' Loan etc. Co. v. Kansas City etc. R. Co.* (1892) 53 Fed. 182, 184.

In *Sage v. Memphis etc. R. Co.* (1888) 125 U. S. 361, 376, 31 L. ed. 694, 698, 8 Sup. Ct. 887, in regard to the dis-

cretion to be exercised in appointing a receiver for a railroad, the court said: "Whether a receiver shall be appointed is always a matter of discretion, to be exercised sparingly and with great caution in the case of quasi-public corporations operating a public highway, and always with reference to the special circumstances of each case as it arises."

is involved, the reluctance of the courts to appoint a managing receiver is based upon the further idea that such a step involves a virtual displacement of the board of directors. It displaces, so it is said, the board of managers placed there by the stockholders, such managers occupying the relation of trustees for the stockholders, for the corporation, and for its creditors. However, in cases where it is necessary, a managing receiver of a business enterprise can undoubtedly be appointed.²⁸

Coke v. Mohr (1896) 164 U. S. 311, 41 L. ed. 447: A receiver was authorized to manage and conduct a hotel "in substantially the same manner as it has heretofore been carried on." By a later order he was authorized to borrow money to pay rent and debts incurred or to be incurred on account of running expenses. In approving these measures, the supreme court observed: "In view of the fact that the closing of the hotel, even temporarily, would have soon become known to its patrons, and would probably have been attended by a serious loss to the good will of the business, we think the court did not exceed its authority in directing the receiver to keep it open during the pendency of the suit."

§ 2522. Jurisdiction of Court as Affecting Validity of Receivership Proceedings.

A bill upon which the appointment of a receiver is sought should show a cause of action within the jurisdiction of the court. It must appear not only that the court has essential jurisdiction of the cause as being one of federal cognizance, but also that the suit is one of which the court has general jurisdiction as a court of equity. If the bill shows a total want of jurisdiction, the order appointing the receiver would be void; and at any rate if it turns out that the court lacks jurisdiction, various perplexities may arise.²⁹ However, the validity of orders made in a receivership cause does not depend on the actual existence of lawful jurisdiction, where the same appears at the time such orders are made.³⁰

Electrical Supply Co. v. Put-in-Bay Waterworks etc. Co. (1898) 84 Fed. 740: Several months after a receiver had been put in possession and after certificates

²⁸ *Overton v. Memphis etc. R. Co.* hands of a trustee, and authorized him (1882) 10 Fed. 803, 3 McCrary 436; *Robinson v. Taylor* (1890) 42 Fed. 803, to take immediate possession, which he did. This act was treated as a virtual abdication of their function by the board of directors).
²⁹ *Ryder v. Bateman* (1898) 93 Fed. 23.
³⁰ *Baltimore Building etc. Assoc. v. Alderson* (C. C. A.; 1900) 29 C. C. A. 409, 99 Fed. 489.

issued by authority of the court had been sold, it was made to appear that the suit had been collusively brought. It thereupon became necessary for the court to dismiss the suit, but before doing so finally and absolutely the court proceeded to give relief to those, including the holders of the certificates, who had acted on the faith of the court's orders.

§ 2523. Same—Existence of Remedy at Law.

Though an order appointing a receiver is wholly void where the court lacks essential jurisdiction of the subject-matter and the same appears on the face of the proceedings, such is not the case where the defect is merely that the plaintiff has an adequate remedy at law and the cause in consequence is not properly one of equitable cognizance.³¹ The objection that the plaintiff has an adequate remedy at law should be taken at an early stage in the suit, otherwise it is waived. Thus a receiver may be appointed in a creditors' suit brought by an unsecured creditor who has not reduced his claim to judgment, where the defendant appears, and by its sworn answer confesses the debt and its insolvency, and joins in the prayer for the appointment of the receiver.³²

§ 2524. Receivership Dependent on Plaintiff's Title to Equitable Relief.

The appointment of a receiver is, in its nature, an auxiliary relief properly incident to other equitable relief. Hence before a receiver will be appointed, the bill must point out and call for some suitable independent equitable relief to which the plaintiff is entitled and to which the receivership may be considered as a proper auxiliary relief. If the bill shows no title to independent equitable relief, it cannot be maintained merely for the purpose of obtaining the receivership.³³ But where the court has jurisdiction of the person and of the subject-matter, the validity of the receivership proceedings is not affected by the fact that the bill is, at a later stage, found not to state a good cause of action. The appointment of a receiver in such case is erroneous only and not void; and hence the order cannot be collaterally attacked.³⁴

³¹ *Clark v. Brown* (C. C. A.; 1902) 57 C. C. A. 76, 119 Fed. 130.

³² *Horn v. Pere Marquette R. Co.* (C. C. A.; 1907) 151 Fed. 633.

³³ *Hutchinson v. American Palace Car Co.* (1900) 104 Fed. 182, 185; *Becker v. Hoke* (C. C. A.; 1897) 26 C. C. A. 282, 80 Fed. 973.

Putnam, J., said in *Conklin v. U. S.*

Shipbuilding Co. (1903) 123 Fed. 913, 918: "If it were clear that this bill was brought, as so many bills are, simply for the purpose of getting a receiver, I should not concern myself about it."

³⁴ *Olmstead v. Distilling etc. Co.* (1895) 73 Fed. 44; *Shinney v. North American etc. Co.* (1899) 97 Fed. 9.

§ 2525. Territorial Limit of Jurisdiction over Property.

Though a court of equity may, by means of an order *in personam*, compel a party subject to its control to execute a conveyance of property beyond the jurisdiction of the court, the principle is well established that a court of equity has no power directly to reach and control, through its receiver, property of a defendant located beyond the territorial jurisdiction of the court, as where the property is situated in another state.³⁵ An order appointing a receiver of realty has no extraterritorial operation and cannot affect the title to real property located beyond the jurisdiction of the court by which the order was made.³⁶

§ 2526. In What District Receiver May Be Appointed.

A receiver can be appointed in any district where jurisdiction can be obtained over the defendant, and if, in a case where jurisdiction exists, a corporation defendant sees fit, by appearing and answering, to waive its privilege not to be sued in a particular district, a receiver can be appointed in that district.³⁷

Central Trust Co. v. McGeorge (1894) 151 U. S. 131, 135, 14 Sup. Ct. 286, 38 L. ed. 99, 101: Where a corporation had waived the fact that it was sued in the wrong district by an appearance and consent to the appointment of a receiver, the objection was subsequently made by stockholders and creditors who came in and challenged the appointment so made. After deciding that neither the plaintiff nor the defendant was a resident of the district, the court ruled that the objection, though good if made in time by the defendant, had been waived. The court then added: "It is scarcely necessary to say that, as the defendant company had submitted itself to the jurisdiction of the court, such voluntary action could not be overruled at the instance of the stockholders and creditors, not parties to the suit as brought, but who were permitted to become such by an intervening petition." ³⁸

§ 2527. Appointment of Receiver in State Where Corporation Organized.

Where a corporation is to be wound up, the proceedings to that end can be instituted in the state where the corporation was organized; and a general receivership may be instituted there, though the corporation in question has no property within the limits of the particular jurisdiction. The initial proceedings having been instituted at

³⁵ *Kittel v. Augusta etc. R. Co.* (1897) 78 Fed. 855. ³⁷ *Lewis v. American Naval Stores Co.* (1902) 119 Fed. 391.

³⁶ *Schindelholz v. Cullum* (C. C. A.; 1893) 55 Fed. 885, 5 C. C. A. 293. ³⁸ *Grank Trunk R. Co. v. Central Vermont R. Co.* (1898) 85 Fed. 87, *accord*.

the place of domicile, and a general receiver having been there appointed, ancillary receiverships may be instituted in other jurisdictions where any property is found requiring to be administered in the main suit.³⁹

§ 2528. Appointment of Receiver as Affected by State Statutes.

The practice of the federal courts in regard to the appointment of receivers is governed exclusively by the rules and statutes governing the procedure of the federal court and by the principles of procedure developed by them from the English practice in regard to receivers. But notwithstanding this, the right of a federal court to appoint a receiver may sometimes be materially affected by state statutes. For instance, if a state statute creates a substantive right inconsistent with the right to have a receiver appointed, a federal court will not appoint a receiver, though upon the general principles governing its own practice a receiver would be appointed.⁴⁰

Conflict of Jurisdiction in Receivership Proceedings.

§ 2529. Exclusive Authority of Court First Acquiring Jurisdiction over Res.

In suits involving the appointment of receivers, a conflict sometimes arises between courts exercising concurrent jurisdiction, as where separate suits seeking the appointment of a receiver over the property of a particular individual or corporation are instituted at about the same time by different plaintiffs in both the state court and federal court or in two different federal courts. Upon the main and great principle involved in such cases there is no diversity of opinion among the courts. This principle is that the court first acquiring jurisdiction over the property in controversy, or over the *res* that constitutes the subject-matter of the suit, is entitled to retain that jurisdiction to the end of the litigation without interference from any other court whatever.⁴¹

³⁹ *Hutchinson v. American Palace Car Co.* (1900) 104 Fed. 182.

⁴⁰ *Union Mut. etc. Co. v. Union Mills Plaster Co.* (1889) 3 L.R.A. 90, 37 Fed. 201 (where a local statute takes away the right of a mortgagee to obtain possession until after foreclosure and confirmation of the sale, and where the same statute is held to secure to the mortgagee the right to the rents and profits pending foreclosure, the federal court will not grant an order for the appointment of a receiver upon a showing that the security is inadequate and that the profits are being wasted).

⁴¹ *Smith v. M'Iver* (1824) 9 Wheat. 532, 535, 6 L. ed. 152, 153; *Hagan v. Lucas* (1836) 10 Pet. 406, 9 L. ed. 470; *Peck v. Jenness* (1849) 7 How. 612, 625, 12 L. ed. 841, 846; *Taylor v. Carryl*

§ 2530. General Scope and Application of Doctrine.

This principle applies in every case where a court acquires jurisdiction over property or obtains possession of it, whether by attachment, replevin, or by other mesne or final process, or by sequestration, or appointment of a receiver, or by any other means. The doctrine extends to cases where suits are brought to enforce liens against specific property, to marshal assets, administer trusts, or liquidate insolvent estates, and to all other suits of a similar nature, where, in the progress of the litigation, the court may be compelled to assume the possession and control of specific personal or real property.⁴²

§ 2531. Application of Doctrine in Receivership Proceedings.

As applied to receivership causes, the rule imports that one court will not appoint a receiver for property where a receiver has already been appointed for the same property by another court of competent jurisdiction, such prior receiver having already taken possession of the property; or if a receiver is in fact appointed over property already in the hands of a prior receiver, he will not be permitted in any manner to interfere with the rights or possession of the first.⁴³ Where a foreclosure suit resulting in the appointment of a receiver is brought by second lienholders and the first lienholders are not made parties,

(1857) 20 How. 533, 536, 15 L. ed. 1023, 961, 966; *Reinach v. Railroad Co.* (1878) 1032; *Freeman v. Howe* (1860) 24 How. 58 Fed. 33, 44; *Wadley v. Blount* (1895) 450, 457, 16 L. ed. 749, 751; *Riggs v.* 65 Fed. 667, 674; *Cohen v. Solomon Johnson County* (1867) 6 Wall. 166, 186, (1895) 66 Fed. 411, 413, 414; *Hatch v.* 18 L. ed. 768, 776; *Covell v. Heyman* Bancroft-Thompson Co. (1895) 67 Fed. (1884) 111 U. S. 176, 28 L. ed. 390, 4 802, 807; *Foley v. Hartley* (1896) 72 Sup. Ct. 355; *Heldritter v. Oilcloth Co.* Fed. 576, 573; *State Trust Co. v. National Land etc. Co.* (1893) 72 Fed. 575; (1884) 112 U. S. 294, 300, 302, 28 L. ed. 729, 731, 732; *Harkrader v. Wadley* In re Hall & Stilson Co. (1896) 73 Fed. (1898) 172 U. S. 148, 164, 43 L. ed. 527; *Gamble v. City of San Diego* (1897) 399, 404, 18 Sup. Ct. 119; *Byers v. McAuley* (1893) 149 U. S. 608, 37 L. ed. 79 Fed. 497, 500; *Atlantic Trust Co. v. Woodbridge Canal etc. Co.* (1897) 79 Fed. 501; *Zimmerman v. So Relle* (1897) 8. 168, 39 L. ed. 669; *Farmers' Loan etc. Co. v. Lake Street El. R. Co.* (1900) 177 Fed. 501; *U. S. 51, 44 L. ed. 661; Bell v. Trust Co.* Sampson (1897) 84 Fed. 63, 66; *Rodgers* (1858) 1 Biss. 280, Fed. Cas. No. 1,260; *v. Pitt* (1899) 96 Fed. 670. ⁴² *Merritt v. American Steel-Barge Co.* (C. C. A.; 1897) 24 C. C. A. 530, 79 Fed. 231. ⁴³ *Garner v. Southern Mut. etc. Assoc.* (1897) 28 C. C. A. 381, 84 Fed. 3; *Central Trust Co. v. South Atlantic etc. R. Co.* (1893) 57 Fed. 3; *Bruce v. Manchester etc. R. Co.* (1884) 19 Fed. 345; *Sharon v. Terry* (1898) 1 L.R.A. 573, 36 Fed. 327, 259; *Gates v. Bucki* Hutchinson v. Green (1881) 6 Fed. 837; *Young v. Montgomery etc. R. Co.* (1875) (C. C. A.; 1896) 4 C. C. A. 116, 53 Fed. 2 Woods 618.

the latter cannot, in an independent foreclosure suit, obtain the appointment of a receiver until the first court discharges its receiver and surrenders possession of the property. This rule applies whether the different suits are brought respectively in state and federal courts or both in federal courts.⁴⁴

The same principle prevents a person from getting possession of property, during the pendency of a receivership, by means of any independent proceeding, even though it is brought in the same court that is entertaining the receivership cause.⁴⁵ Neither that court nor any other court will undertake to displace the receiver in any independent suit. The proper mode of proceeding is to obtain leave of the court to file a petition in the main cause.

§ 2532. Conflict of Jurisdiction between State and Federal Courts.

The doctrine by which one court is precluded from interfering with another court in the control of property already in its possession is primarily based upon the idea that when one court acquires jurisdiction over a *res*, this necessarily excludes another court from exercising jurisdiction over the same property. The second court is incompetent to exert jurisdiction over property already in the custody and control of another court. When the question arises between a federal court and a state court, an additional idea is involved, namely, the idea of comity; and judging from expressions found in many of the cases, one might suppose that as between the state and federal courts comity alone operates to prevent one of these courts from interfering with the administration of property in the hands of the other. But even in this case something more is involved than a mere principle of comity. As the supreme court of the United States has well said, the courts of

⁴⁴ *Young v. Montgomery etc. R. Co.* (1875) 2 Woods 606, Fed. Cas. No. 18,166. In a suit brought by the holder of first mortgage bonds it appeared that a suit was already pending in another federal court brought by the holder of second mortgage bonds and that a receiver appointed by that court had taken possession of the property. This was held sufficient to preclude the appointment of a receiver in the second court. The court set forth the mutual relation and bearing of the two suits thus: "As the latter [i. e., the holders of the second mortgage bonds] have commenced their suits first, and have first obtained possession of the mortgaged property, the suit of the first mortgage bondholders cannot be allowed to interfere with the suit of the second mortgage bondholders. They can only interfere by being admitted as parties in that suit. When the suit of the second mortgage bondholders has ripened into a decree of sale and the property has been sold, the first mortgage holders may then proceed in their suit to subject the property again to sale to satisfy their lien. But not till the proceedings in the first suit have so resulted that the property is no longer in the possession of the court through its receiver, can any other court or parties interfere with it."

⁴⁵ *American Loan etc. Co. v. Central Vermont R. Co.* (1898) 86 Fed. 390.

the several states and the courts of the United States do not belong to the same system so far as their jurisdiction is concurrent; and though they coexist in the same space, they are independent, and have no common superior. They exercise jurisdiction, it is true, within the same territory, but not on the same plane: and when one takes into its jurisdiction a specific thing, that *res* is as much withdrawn from the judicial power of the other as if it had been carried physically into a different territorial sovereignty.⁴⁶

§ 2533. When Exclusive Jurisdiction Attaches.

As regards the application of the general principle, the courts are not in harmony, and much confusion is found in the decided cases. The point of difficulty is in determining just when one court first acquires jurisdiction over the property in controversy, so as thereby to exclude the jurisdiction of another court of concurrent jurisdiction and to prevent it from subsequently taking possession of the same property. No trouble arises where the court first exercising jurisdiction has, through its receiver or otherwise, obtained actual physical possession of the property in dispute. Here the rule obviously applies; and the authorities on this point are unanimous.⁴⁷ The main controversy has been on the question whether the mere filing of the bill coupled with due service of process on the defendant is sufficient, or whether, on the other hand, it is not necessary that actual possession should be taken. There are a number of cases in which it has been held that the question of jurisdiction is to be determined by the service of process, and not by the date of the actual taking of possession. Under this rule, if a bill is filed for the appointment of a receiver and process is actually served, the court in which such suit is filed thereby acquires such jurisdiction as will prevent another court from interfering with the property; and it is not necessary that the receiver should actually possess himself of the property.⁴⁸ On the

⁴⁶ *Covell v. Heyman* (1884) 111 U. S. 176, 182, 28 L. ed. 390, 392. *Naval Stores Co. v. Owens* (1902) 119 Fed. 399; *Owens v. Ohio Central R. Co.* (1884) 20

⁴⁷ *Heidritter v. Elizabeth Oilcloth Co.* Fed. 10; *Bell v. Ohio L. & T. Co.* (1858) (1884) 112 U. S. 294, 305, 28 L. ed. 729, 1 Biss. 280; *U. S. v. Eisenbeis* (C. C. 733; *Buck v. Colbath* (1865) 3 Wall. 334, A.; 1901) 50 C. C. A. 179, 112 Fed. 197; 18 L. ed. 257; *Baltimore etc. R. Co. v. Illinois Steel Co. v. Putnam* (C. C. A.; *Wabash R. Co.* (C. C. A.; 1902) 57 C. 1895) 15 C. C. A. 556, 68 Fed. 515. C. A. 322, 119 Fed. 678.

⁴⁸ Jurisdiction determined by date of exclusive jurisdiction of the first court service: *Wilmer v. Atlanta etc. R. Co.* may attach from the filing of a bill. (1874) 2 Woods 410; *Adams v. Trust Farmers' Loan & Trust Co. v. Lake Co.* (C. C. A.; 1895) 15 C. C. A. 1, Street etc. R. Co. (1900) 177 U. S. 51, 66 Fed. 617, 620; *Lewis v. American* 60, 44 L. ed. 667, 671, 20 Sup. Ct. 564,

other hand, it has sometimes been held that the exclusive jurisdiction of the first court does not attach until it (or its receiver) has taken actual possession of the property. In this view possession is considered the essential and main constituent of jurisdiction.⁴⁹

§ 2534. Same Question Further Considered.

It should be borne in mind in this connection that the determining factor is, which court has first obtained jurisdiction over the property—and we are here concerned only with suits involving the exercise of jurisdiction over property. The test is not to be found in the matter of jurisdiction over the parties or over the controversy. The court acquires jurisdiction over the controversy, in a certain sense, upon the filing of the bill; and it acquires jurisdiction over the party defendant upon the service of process. But this does not always confer jurisdiction over the property that is the subject-matter of the suit. Upon principle it appears that those decisions in which the courts have insisted upon the taking possession of the property as the true test are more nearly correct than are those in which the courts have insisted that the mere service of process is enough to exclude the jurisdiction of another court. Undoubtedly, however, there are situations in which the mere filing of the bill and the subsequent service of process does confer a jurisdiction over the property. There are cases in which the assumption of jurisdiction over the property is necessarily involved in the fact that the court assumes to entertain the suit at all. The idea has been expressed thus: "Where . . . the possession and control of the property are necessary to the exercise of the jurisdiction of the court, the filing of the bill and service of process is an equitable levy on the property, and pending the proceedings such property may properly be held to be *in gremio legis*. The actual seizure of the property is not necessary to produce this effect where the possession of the property is necessary to the granting of the relief sought."⁵⁰

⁴⁹ *In re Hall & Stilson Co.* (1896) 73 Fed. 527, 529, 530; *Knott v. Evening Post Co.* (1903) 124 Fed. 342; *East Tennessee etc. R. Co. v. Atlanta etc. R. Co.* (1892) 15 L.R.A. 109, 49 Fed. 608; *Wilmer v. Atlanta etc. R. Co.* (1875) 2 Woods 410 (per Bradley, Circuit Justice).
⁵⁰ *Illinois Steel Co. v. Putnam* (C. C. A.; 1895) 15 C. C. A. 556, 68 Fed. 516, citing *Adams v. Trust Co.* (C. C. A.; 1895) 15 C. C. A. 1, 66 Fed. 617.

"Where the subject-matter of the suit in equity is real estate, which is taken into the possession of the court pending the litigation, by the appointment of a receiver, or by sequestration, the title is bound from the filing of the bill; and any purchaser *pendente lite*, even if for a valuable consideration, comes in at his peril." *Wiswall v. Sampson* (1852) 14 How. 52, 65, 14 L. ed. 322, 323. See *Hitz v. Jenks* (1902) 185 U. S. 166, 46 L. ed. 855.

§ 2535. General Principle Stated.

Though it is not possible to deduce a principle upon which all the cases can be reconciled, it may be said generally that in order for the jurisdiction of one court over property to be exclusive, it is necessary that there should be (1) either an actual taking possession of the property, or (2) the suit must be of such character as necessarily to involve the assumption of jurisdiction over the property, or (3) the court must do some act sufficient to bring the property under its control.⁵¹ It has been held that where a bill is filed to foreclose a mortgage, and the appointment of a receiver is asked for as an incident to the foreclosure, and the court at the inception of the suit grants a restraining order to prevent a transfer of the property until the court may act on the motion for a receiver, the granting of such injunction involves an assumption of jurisdiction over the property such as will give the court granting such order exclusive jurisdiction.⁵²

§ 2536. Invalid Receivership Insufficient to Confer Exclusive Jurisdiction.

Where the judge of a state court appoints a receiver during vacation, but without statutory authority to do so, such appointment is ineffectual; and the taking of possession by such receiver is no obstacle to the appointment of a receiver for the same property in a suit brought in the federal court.⁵³

§ 2537. When Concurrent Suits Maintainable.

The fact that a receiver has been appointed by a federal court and that possession has been taken by him of property within the jurisdiction of the court of appointment does not prevent a state court from entertaining a suit and appointing a receiver in a cause of action against the same defendant, provided such receiver does not interfere with the property of which the receiver appointed by the federal court has already obtained possession.⁵⁴ Upon a similar principle the fact

⁵¹ See, generally, 23 Am. and Eng. Encyc. of Law (2d ed.) p. 1112; 1 Pomeroy's Equitable Remedies, § 170; Adams v. Mercantile Trust Co. (C. C. A.; 1895) 15 C. C. A. 1, and note pp. 6-13, 66 Fed. 617; Louisville Trust Co. v. City of Cincinnati (C. C. A.; 1896) 22 C. C. A. 334, and note, pp. 356-376, 76 Fed. 296.

⁵² See, generally, 23 Am. and Eng. Encyc. of Law (2d ed.) p. 1112; 1 Pomeroy's Equitable Remedies, § 170; Adams v. Mercantile Trust Co. (C. C. A.; 1895) 15 C. C. A. 1, and note pp. 6-13, 66 Fed. 617; Louisville Trust Co. v. City of Cincinnati (C. C. A.; 1896) 22 C. C. A. 334, and note, pp. 356-376, 76 Fed. 296.

⁵³ Appleton Waterworks Co. v. Central Trust Co. (C. C. A.; 1899) 35 C. C. A. 302, 93 Fed. 286.

⁵⁴ Hammock v. Farmers' Loan & Trust Co. (1881) 105 U. S. 77, 26 L. ed. 1111.

⁵⁵ Leadville Coal Co. v. McCreery (1891) 141 U. S. 476, 38 L. ed. 624, 12 Sup. Ct. 28. In its decree appointing a receiver, the state court made the following reservation: "But inasmuch as it appears that the estate and effects of said [defendant] are at the present time in the hands of a receiver appointed by and acting under the orders of the circuit court of the United States for the

that a receiver has been appointed by a state court and that possession has been taken by him of the property of the defendant does not prevent a federal court from entertaining a suit in respect to the same property against the same defendant and giving such relief as it may give without interfering with the state court. Thus where a state court has appointed a receiver under a foreclosure suit brought by a second mortgagee and thereby obtained possession of the property, the federal court will not appoint a receiver in a suit brought by the first mortgage, but it will entertain the suit and give such relief as it may without interfering with the state court.

Metropolitan Trust Co. v. Lake Cities etc. Co. (1900) 100 Fed. 897, 899: In a case where the situation just indicated was presented it was said: "This court concedes that it can decree no relief in the present suit which will in any wise disturb the possession of the property in the custody of the state court. It cannot appoint a receiver for that property, nor can it cause the same to be sold by its master. To do these things would tend to disturb the possession of the state court, and might lead to unseemly conflict. But because the court cannot grant all the relief prayed for does not justify it in refusing to grant such relief within its jurisdiction as the nature of the case requires for the protection of the rights of the complainant. The entry of a decree of foreclosure against the railway company, and an order for the sale of its plant and property, will not, of themselves, disturb the possession of the state court."⁵⁵

It was further held in this case that the federal court had jurisdiction to determine the relative rank of the certificates issued by the receiver of the state court and the lien of the plaintiff in the federal court, the reason being that the state court had had no jurisdiction or power to create a lien superior to that of this plaintiff, he not having been a party to the suit in the state court.

§ 2538. Vindication of Jurisdiction of Federal Court—Injunction against Suit in State Court.

The federal court, having once acquired jurisdiction over property through the appointment of a receiver, will proceed to final determination of the rights of the parties and to the execution of its decree without regard to subsequent proceedings in a state court.⁵⁶ And the federal court, having acquired prior jurisdiction over the subject-matter, will enjoin at any time a suit in a state court subsequently

Northern District of Ohio, it is ordered that the receiver hereby appointed shall not interfere with the possession of the receiver appointed by said federal court of the effects and assets of said corporation."

⁵⁵ See *Mercantile Trust Co. v. Lamoille Val. R. Co.* (1879) 16 Blatch. 324, Fed. Cas. No. 9,432; *Young v. Montgomery etc. R. Co.* (1875) 2 Woods 606, Fed. Cas. No. 18,106; *Griawold v. Central Vermont R. Co.* (1881) 9 Fed. 797, 20 Blatch. 212.

⁵⁶ *In re Hall & Stilson Co.* (1896) 73 Fed. 527; *Holland Trust Co. v. International etc. Co.* (C. C. A.; 1898) 85 Fed. 865, *affirming* (1897) 81 Fed. 422, 26 C. C. A. 469.

brought, where such injunction is necessary to protect the jurisdiction of the federal court. Thus a suit in a state court brought against a federal receiver may be enjoined by the court appointing the receiver where such court has exclusive jurisdiction and the suit in question would interfere with the control of the court over the receivership property. The statute declaring that the writ of injunction shall not be granted by a federal court against proceedings in a state court does not apply where the object of the injunction is to protect the exclusive jurisdiction of the federal court previously acquired.⁵⁷

Receivership Business to Be Conducted According to Laws of State.

§ 2539. Amenability of Receiver to State Laws.

We have seen that by the mere fact that property has been placed in the hands of a receiver appointed by a federal court all other courts are deprived of the power to exercise jurisdiction over the property; and the receiver himself, being a mere arm of the court, is peculiarly under its protection and jurisdiction, so that he is not subject to be controlled or held liable by any other court. One of the necessary consequences of this principle is that a federal receiver or manager in possession of a railroad is not amenable to the courts of the state in which the railroad operated by him is situated; and he cannot be compelled to obey the laws of such state except in so far as he is directed to obey them by the court that appointed him. This rule has been considered to be capable of abuse, and it has therefore been abolished by an act of Congress:

Act of August 13, 1888 ch. 866, sec. 2: Whenever in any cause pending in any court of the United States there shall be a receiver or manager in possession of any property, such receiver shall manage and operate such property according to the requirements of the valid laws of the state in which such property shall be situated, in the same manner that the owner or possessor thereof would be bound to do if in possession thereof. Any receiver or manager who shall wilfully violate the provisions of this section shall be deemed guilty of a misdemeanor, and shall, on conviction thereof, be punished by a fine not exceeding three thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

⁵⁷ *Jesup v. Railroad Co.* (1890) 44 R. Co. (1901) 110 Fed. 10; *Stewart v. Fed. 663*; *Central Trust Co. v. St. Louis* Wisconsin etc. R. Co. (1902) 117 Fed. etc. R. Co. (1893) 59 Fed. 385; *Terre 782*; *Farmers' Loan etc. Co. v. Chicago Haute etc. R. Co. v. Peoria etc. R. Co. etc. R. Co. (1902) 118 Fed. 204*; *Garner (1897) 82 Fed. 943*; *Fidelity Ins. etc. Co. v. Bank (1895) 67 Fed. 833, 16 C. C. A. v. Norfolk etc. R. Co. (1898) 88 Fed. 86. 815*; *State Trust Co. v. Kansas City etc. Eq. Prac. Vol. II.—93.*

§ 2540. Receivership to Be Conducted in Conformity with State Statutes.

Under this law it becomes the duty of a receiver appointed by a federal court, to operate his road and to manage other property committed to his care according to the statutes of the state in which the property is situated or business conducted;⁵⁸ and whenever a court appointing a receiver is made to know, in any proper way, that its receiver is violating the law of the state, the court will of its own motion direct him to cease further violation.⁵⁹ But the requirement of the statute that the receiver shall operate his property in accordance with the laws of the state is not to be construed as requiring the court to administer the property in its hands agreeably to the laws of a state.⁶⁰

Proceedings Incident to Appointment of Receiver.

§ 2541. Filing of Bill as Necessary Prerequisite.

From the fact that a receivership is a dependent proceeding and maintainable only during the main litigation, it follows that the appointment of a receiver can never properly be made until a suit in equity is duly and properly begun; for until a bill is filed, there is nothing to support the jurisdiction for the appointment of a receiver.⁶¹ An order granted before the filing of a bill, appointing a receiver and authorizing him forthwith to take possession of property, is doubtless totally void,⁶² unless possibly where the property in question belongs to an infant or lunatic and the application is made on his behalf;⁶³ and certainly the appointment of a receiver in any ordinary case, upon a mere *ex parte* application before the filing of a bill, will be vacated on motion as having been irregularly made.⁶⁴

⁵⁸ *Erb v. Morasch* (1900) 177 U. S. 584, 44 L. ed. 897; *Houston First Nat. Bank v. Ewing* (C. C. A.; 1900) 103 Fed. 195, 43 C. C. A. 150.

⁵⁹ *Felton v. Ackerman* (C. C. A.; 1894) 61 Fed. 228, 9 C. C. A. 457.

⁶⁰ *First Nat Bank v. Ewing* (C. C. A.; 1900) 103 Fed. 168, 195, 43 C. C. A. 150.

⁶¹ No application for the appointment of a receiver will be entertained except after a bill has been filed and a subpoena issued thereon. No. 30 of Rules of Circuit Court for the Northern District of California.

Apparently the only exception recognized in the English chancery to the rule that a receiver cannot be appointed unless a suit is pending was in the case of the estate of idiots and lunatics (3 Dan. Ch. Pr. 426); though the exception has also been stated to extend to cases involving the interests of infants. *In re Brant* (1899) 96 Fed. 257.

⁶² *Merchants etc. Bank v. Kent* (1880) 43 Mich. 292, 5 N. W. 627.

⁶³ *In re Brant* (1899) 96 Fed. 257.

⁶⁴ *Greene v. Star Cash etc. Co.* (1900) 99 Fed. 656.

§ 2542. No Ancillary Receiver without Ancillary Suit.

The rule requiring the filing of a bill as an essential prerequisite to the exercise of the jurisdiction of appointing a receiver is commonly held to be applicable where the appointment of an ancillary receiver is sought. Such a receiver will not be appointed in a court of ancillary jurisdiction until a bill has been filed in such court.⁶⁵

§ 2543. Application to Judge before Formal Filing of Bill.

While it is true the appointment of a receiver presupposes the actual pendency of the suit in which the receiver is appointed, yet if the bill is framed and submitted to a judge at chambers at the same time that the application is made for the appointment of a receiver, this submission of the bill to the judge is, no doubt, such a commencement of the suit as will support the appointment of the receiver, there being no specific rule of the court to the contrary. For instance, if a bill asking for the appointment of a receiver is submitted to a judge and he grants the application for a temporary receiver, his order becomes effective though the bill is not actually lodged with the clerk nor the subpoena served till two days thereafter. In such case the real filing of the bill occurs when it is submitted to the court.⁶⁶

All question on this point is removed where the court takes the bill at chambers, writes out the order of appointment, and makes it provisional upon the actual filing of the bill. The order then takes effect from the moment, and only from the moment, when the bill and order are lodged or filed with the clerk. The order takes effect upon the filing of it, without regard to any delay incident to its being transcribed into the order book by the clerk.⁶⁷

§ 2544. Only Party Plaintiff May Apply for Receiver.

The application for the appointment of a receiver must be made by a party entitled to affirmative relief. This means that the applicant must be in the position of plaintiff or cross-plaintiff.⁶⁸ Where a bill is filed for a receiver but the plaintiff afterwards declines to move

⁶⁵ *In re Brant* (1899) 96 Fed. 257; (C. C. A.; 1902) 113 Fed. 251, 51 C. C. Greene v. Star Cash etc. Co. (1900) 99 A. 208.
⁶⁷ *Horn v. Pere Marquette R. Co.* (C. C. A.; 1907); 151 Fed. 635.
⁶⁸ *Henshaw v. Wells* (1848) 9 Humph. 568, 584; *Leddel v. Starr* (1868) 19 N. J. Eq. 159.

⁶⁶ *Universal etc. Co. v. Stoneburner*

for the appointment, a receiver will not be appointed on the application of the defendant.⁶⁹

§ 2545. No Receiver over Plaintiff's Estate in Possession.

The appointment of a receiver is a remedy incidental to the granting of equitable relief, and it is not a final remedy such as to constitute in itself a species of distinct relief. It follows that a bill seeking the appointment of a receiver must first show a title to distinct equitable relief and also such a state of affairs as will justify the appointment of a receiver as an incident to the obtaining of the final relief. One important and necessary consequence of this principle is that a bill for a receiver cannot be brought by the person over whose property the receivership is to be established, for no person can be entitled to substantive relief against himself, and where there is no title to substantive relief the right to the incidental relief cannot exist. It has accordingly been held that when a corporation becomes insolvent it cannot maintain a bill in equity for the appointment of a receiver to wind up its own affairs. A receiver may be appointed in a proper case at the instance of a creditor or other person showing a good right to a receivership but not at the instance of the insolvent debtor himself.⁷⁰ The same rule would of course apply in the case of a private person. No one can have a receiver appointed over his own property where it is already in his possession and control.

§ 2546. Bill by Insolvent Company Seeking Receivership over Own Affairs.

The rule stated in the preceding paragraph, though unquestionably sound, has sometimes been violated in the federal courts. Thus upon one or two occasions a bill has been maintained by an insolvent corporation, alleging its insolvency and seeking the appointment of a receiver for the benefit of all concerned.⁷¹ This practice is undoubt-

⁶⁹ Robinson v. Hadley (1849) 11 Beav. 614. may be obtained as a simple way out of financial difficulties, even where the road is not actually insolvent.

⁷⁰ Hugh v. McRea (1869) Chase Dec. 466; Kimball v. Goodburn (1875) 32 Mich. 10; Hinckley v. Pfister (1892) 83 Wis. 64, 53 N. W. 21.

A special clause is sometimes inserted in mortgages or trust deeds of railroads, providing that a receiver may be applied for by the trustee, if requested to do by the railroad company, irrespective of the payment of interest on the bonds. Under such a provision a receivership

⁷¹ Wabash, St. L. etc. R. Co. v. Central Trust Co. (1884) 22 Fed. 272 (and the same court, after having appointed the receiver on the *ex parte* application of the corporation, subsequently refused to transfer the receivership to a cross action brought by the mortgage creditors. Central Trust Co. v. Wabash, St. L. etc. R. Co. (1885) 23 Fed. 863).

edly an abuse of equitable jurisdiction, but the error is not of such character as to render the proceedings void or defeat rights acquired under the receivership proceedings. Any objection to such defect of jurisdiction should be made in the early stages of the suit; and it is not available on appeal, no objection having been made in the lower court.⁷³

§ 2547. Prayer for Receiver—Appointment on Motion of Court.

If the exigency justifying the appointment of a receiver is apparent or can be foreseen at the time when the bill is prepared, a special prayer asking for an order for the appointment of a receiver should be inserted in the bill.⁷³ But it is not essential to the appointment of a receiver that the bill should contain a prayer for such relief.⁷⁴ Not infrequently the occasion for the receivership arises after the bill is filed. Furthermore it is not essential that either party should move the court to appoint a receiver. The court will proceed of its own motion to appoint a receiver whenever it is manifest that the exigency of the situation requires that this should be done.

Elk Fork Oil & Gas Co. v. Foster (C. C. A.; 1900) 99 Fed. 495, 39 C. C. A. 615: The existence of conflicting interests in oil and gas rights resulted in the filing of two independent suits between the same parties. Each party obtained an injunction against the other. Neither bill prayed for a receiver, and neither party sought such relief. The suits were heard together as on bill and cross bill. Some difficult questions were presented that could not properly be determined in the early stages of the suit, and it was impossible to say which side was in the right. There was danger of irreparable mischief to the interests of the party that might finally prevail. The court therefore, on its own motion, appointed a receiver to take possession and manage the property *pendente lite*. This course was approved in the circuit court of appeals.

§ 2548. Application on Petition or Motion.

A receiver may be appointed though the bill does not contain a statement of facts sufficient to justify the appointment of the receiver. If a proper case for equitable relief is made out and a case for the appointment of a receiver exists, the application for the appointment

⁷³ *Quincy etc. R. Co. v. Humphreys* plaintiff, in his bill, to ask for any (1892) 145 U. S. 82, 104, 36 L. ed. 632, special order that may be needed pending the suit).
⁷⁴ *Commercial & Savings Bank v. Corbett* (1878) 5 Sawy. 172, Fed. Cas. No. 3,057.

⁷⁵ Equity Rule 21 (requiring the

of the receiver may be made by petition or motion, supported by an affidavit of the essential facts.⁷⁵

The application for the appointment of a receiver is regularly made by petition or motion addressed to the court or a judge of the court in which the cause is pending. An order for the appointment of a receiver can be made by a judge at chambers as well as in open court.⁷⁶

§ 2549. Notice of Application for Receiver.

Notice of the application or motion for the appointment of a receiver should always be given to the person who is to be dispossessed of his property or assets, whenever the giving of such notice is practicable. However, previous notice of the motion for a receiver is not necessary when counsel for the opposite party is present in court;⁷⁷ nor is notice necessary where the court assumes the responsibility of appointing a receiver on its own motion. The court does not have to give notice of its own "motion."⁷⁸

§ 2550. Notice to Persons Not Parties to Suit.

Where the property to be put in the hands of a receiver is extensive and many persons are interested, it is not improper for the court to require the giving of notice to all concerned, so far as practicable, though they be not actual parties to the suit. For instance, upon an interlocutory application for a receivership of a corporation engaged in a manufacturing enterprise, the court ordered that notice of the application for the receivership should be given to the corporation, it being the only respondent named in the prayer for subpoena, also that public notice of the pendency of the application should be given by publication in newspapers circulating in the localities where the creditors and principal stockholders live.⁷⁹

§ 2551. Appointment on Ex Parte Application.

A court of equity has the power to grant an order for the appointment of a receiver upon an *ex parte* application without notice. But

⁷⁵ Commercial etc. Bank v. Corbett of the court. Hammock v. Loan & Trust (1878) 5 Sawy. 172, Fed. Cas. No. 3,057. Co. (1881) 105 U. S. 77, 26 L. ed. 1111.

⁷⁶ Vose v. Reed (1871) 1 Woods, 647.

⁷⁷ McLean v. Lafayette Bank (1844) Fed. Cas. No. 17,011; Horn v. Pere Marquette R. Co. (1907) 151 Fed. 635, 637.

⁷⁸ Elk Fork etc. Co. v. Foster (C. C. A.; 1900) 99 Fed. 495, 39 C. C. A. 615.

⁷⁹ Hutchinson v. American Palace Car Co. (1900) 104 Fed. 182, 184.

In Illinois, a judge of the state circuit court cannot appoint a receiver of a railroad in vacation; and if a receiver is so appointed, his possession is not that

this will be done only in a strong case of pressing emergency or of "imperious necessity," where the circumstances are such as to require immediate action before there is time to give notice; or it must be shown that notice would jeopardize the delivery of the property over which the receivership is to be extended.⁸⁰ It is reversible error for a court to appoint a receiver without notice in cases not of this exceptional kind.⁸¹ Such action can be justified only when the rights of the plaintiff and the relief to which he shows himself entitled can be secured and protected in no other way.⁸² The need for the exercise of the power to appoint a receiver upon an *ex parte* application without notice is greatly lessened in federal courts of equity by reason of the fact that they have power to grant preliminary restraining orders, which will usually preserve the *status quo*. And this mode of proceeding should always be resorted to where it would appear to be sufficient, leaving the question of receivership *vel non* to be considered after due notice.⁸³

Error in appointing a temporary receiver without notice is waived if the party concerned makes no objection thereto when the permanent receiver is appointed.⁸⁴

§ 2552. Right of Defendant to Be Subsequently Heard.

If the motion for the appointment of a receiver is made without notice and a sufficient showing is made to justify the appointment upon such *ex parte* application, the common practice is to grant an order for the appointment of a merely temporary receiver. At the same time a rule is entered requiring the defendant to appear and show cause why the application should not be granted and the receivership made permanent.⁸⁵ But whether this particular course is followed or not, the defendant against whom an order has been made for the appointment of a receiver, without notice, must be allowed to come in within a reasonable time and move to have the

⁸⁰ *Bank of Florence v. United States Sav. etc. Co.* (1893) 104 Ala. 297, 16 So. 110.

⁸¹ *North American Land etc. Co. v. Watkins* (C. C. A.; 1901) 109 Fed. 101, 48 C. C. A. 254; *Cabaniss v. Reco Min. Co.* (C. C. A.; 1902) 116 Fed. 318, 54 C. C. A. 190; *Joseph Dry Goods Co. v. Hecht* (C. C. A.; 1903) 120 Fed. 760, 57 C. C. A. 64.

Receiver appointed upon *ex parte* application in suit to foreclose chattel mortgage. *H. B. Claflin Co. v. Furtick* (1902) 119 Fed. 429.

⁸² *Huff v. Bidwell* (C. C. A.; 1907) 151 Fed. 563, 81 C. C. A. 43.

⁸³ *North American etc. Co. v. Watkins* (C. C. A.; 1901) 109 Fed. 101, 48 C. C. A. 254.

⁸⁴ *Huff v. Bidwell* (C. C. A.; 1907) 151 Fed. 563, 81 C. C. A. 43. In this case the court showed its reprobation of the practice of appointing receivers without notice by taxing all the costs of the temporary receivership to the plaintiff who had procured it.

⁸⁵ *Ford v. Taylor* (1905) 137 Fed. 149.

order rescinded; and if the court appointing the receiver unduly postpones the right of such party to appear and contest the proceedings, the proceeding is irregular and will be vacated on appeal.⁸⁶

§ 2553. Hearing on Application for Receiver.

The hearing of an application for the appointment of a receiver, whether upon *ex parte* application or upon notice and appearance of the adverse party, is a purely interlocutory hearing; and the case cannot then be determined upon its merits as at a final hearing.⁸⁷

§ 2554. Plaintiff's Showing.

In order to sustain his application, the plaintiff is entitled to use his verified bill or petition and any affidavit or affidavits that he may choose to file. The statements of fact upon which the application is based must be specific. Mere general allegations to the effect that the appointment of a receiver is necessary to prevent irreparable injury are not sufficient. Where a receiver is sought for a corporation on the ground of fraud and mismanagement on the part of the corporate officers, the bill must clearly show in what the frauds consist. The mere belief of the plaintiff that rascality has been committed, coupled with general averments of negligence and bad management, will not suffice.⁸⁸

The appointment of a receiver may be justified by the admissions of the answer on points not fully covered and made clear by the allegations of the bill.⁸⁹

§ 2555. Defendant's Showing.

A defendant who resists an application for the appointment of a receiver is entitled to use his verified answer (where his answer is ready to be filed), together with such affidavits as he may see fit to introduce for the purpose of meeting the case made in the plaintiff's bill, or petition, and affidavits, or for the purpose of supporting any affirmative defense stated in the defendant's own answer. The defendant is entitled to swear to his answer and use the same as an affidavit on the motion for the appointment of a receiver, though the answer under oath is waived in the bill.⁹⁰

⁸⁶ *Williamson v. Wilson* (1826) 1 Bland Ch. 424.

⁸⁷ *Kerp v. Michigan Lake Shore R. Co.* (1873) Fed. Cas. No. 7,727.

⁸⁸ *Clark v. National Linseed Oil Co.* (C. C. A.; 1901) 105 Fed. 787, 45 C. C. A. 53.

⁸⁹ *Union Mut. Life Ins. Co. v. Kellogg* (1878) Fed. Cas. No. 14,373.

⁹⁰ *Ryder v. Bateman* (1898) 93 Fed. 16.

§ 2556. Weight of Answer.

Where the answer under oath is waived in the bill but the answer is nevertheless sworn to and used as an affidavit in resisting the application for the appointment of a receiver, it is to be given the same effect and weight as would formerly have been attributed to it before the rule was adopted allowing the plaintiff to waive the answer under oath; for the rule in which that privilege is given expressly declares that notwithstanding the waiver of the oath, the answer may nevertheless be used "as an affidavit, with the same effect as heretofore," on any incidental motion in the cause.⁹¹ Judicial expressions are found in some of the cases to the effect that if the answer under oath is not waived in the bill, the sworn answer has a greater weight in opposition to the application for the receiver than it has in a case where the oath is waived and the defendant swears to the answer for the purpose of using it as a mere affidavit.⁹² But this is a mistaken notion. The correct doctrine is that if the answer under oath is not waived, the sworn answer denying the facts upon which the application for a receiver is based is sufficient to meet the plaintiff's case, and the receiver will not be appointed. Likewise if the answer under oath is waived in the bill, but the plaintiff nevertheless swears to it for the purpose of using it as an affidavit in resistance to the application for a receiver, such answer will also be accepted as sufficient to meet the case stated in the plaintiff's bill, and the receiver will not be appointed. Such is the rule where the motion for the receiver is heard upon the allegations of the bill and answer, without any affidavits being put in by either party.⁹³ Indeed, it has been pointed out that in every sort of interlocutory proceeding in equity causes, where an application is made upon petition and answer merely, without proof, the same principle applies as where the cause is set for hearing and heard on bill and answer, that is, the party answering is entitled to the benefit of all responsive denials contained in the answer. Also, the new defensive matter set up in the answer is to be taken as true. The decision can be given in favor of the petitioner only where the answer contains sufficient admissions to make out the plaintiff's title to relief and sets up no affirmative facts in avoidance.⁹⁴

⁹¹ Equity Rule 41 (as amended December Term, 1871).

⁹² *U. S. v. Workingmen's etc. Council* (1893) 54 Fed. 994, 996, 26 L.R.A. 158; *Ford v. Taylor* (1905) 137 Fed. 149; *Clark v. National Linseed Co.* (C. C. A.; 1901) 105 Fed. 793, 45 C. C. A.

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⁹³ *Ryder v. Bateman* (1898) 93 Fed. 16; *Harrington v. Union Oil Co.* (1906) 144 Fed. 235.

⁹⁴ *Atlantic Trust Co. v. Chapman* (C. C. A.; 1906) 145 Fed. 820, 76 C. C. A. 396.

Of course if the respective parties put in affidavits in support of the bill or answer, and the application is heard upon these as well as upon the bill and answer, the result is to be determined by the weight of all the proof as thus adduced by the parties; and the rule that a receiver will not be appointed over the responsive answer of the defendant does not apply.⁹⁵

§ 2557. Failure to File Replication.

A receiver should not be appointed where the plaintiff fails to file a replication to the defendant's answer within the time allowed therefor; and where a receiver has already been appointed, the bill should be dismissed and the receiver discharged, if the defect incident to the failure to file a replication is not cured by the timely filing of a replication *nunc pro tunc*.⁹⁶

§ 2558. Irregularities as Affecting Validity of Receivership Proceedings.

Where the court has essential jurisdiction of the suit, the validity of an order appointing a receiver is not affected by any mere irregularity in the proceedings or by the fact that the court may have acted with indiscretion in granting the order. The technical insufficiency of the bill or the fact that it is subject to demurrer is immaterial.⁹⁷ For instance, the circumstance that a bill is not verified⁹⁸ or that the court is imposed upon and a receiver obtained by collusion,⁹⁹ does not affect the validity of the receivership proceedings.

Due confirmation of an irregular appointment to a receivership operates to cure the defect, and such appointment must be deemed to be valid from and after the time when the order confirming the previous irregular appointment is entered.¹⁰⁰

§ 2559. Appointment of Receiver Not Subject to Collateral Attack.

As a general rule, an order appointing a receiver is not subject to attack in a collateral proceeding;¹⁰¹ and this is true though the bill

⁹⁵ The practice is of course the same here as that which applies in regard to applications for an injunction or in regard to motions for the dissolution of an injunction. See *ante*, §§ 2333, 2407-2412.

⁹⁶ *Harrington v. Union Oil Co.* (1906) 144 Fed. 235.

⁹⁷ *Farmers' Loan & Trust Co. v. Centuria etc. Co.* (C. C. A.; 1899) 96 Fed. 636, 37 C. C. A. 528.

⁹⁸ *Clark v. Brown* (C. C. A.; 1902) 119 Fed. 130, 57 C. C. A. 76.

⁹⁹ *Sage v. Memphis etc. R. Co.* (1888) 125 U. S. 377, 31 L. ed. 698.

¹⁰⁰ *Hervey v. Illinois Midland R. Co.* (1884) 28 Fed. 169.

¹⁰¹ *Van Antwerp v. Hulburd* (1871) 8 Blatchf. 285; *Young v. Wempe* (1891)

46 Fed. 354; *Shinney v. North American etc. Co.* (1899) 97 Fed. 2.

in the cause in which the appointment was made is so irregular or imperfect as to require amendment,¹⁰² or though the appointment of the receiver is in certain respects irregular or erroneous.¹⁰³ In a suit by a receiver to get in the assets of a corporation, a debtor of the corporation cannot set up the defense that the order of the court appointing the receiver was improvident, inequitable, and erroneous. If the court has jurisdiction of the subject-matter and of the parties, the order appointing the receiver is effective and conclusive on all parties until vacated or reversed. The regularity of the appointment cannot be collaterally questioned by other tribunals.¹⁰⁴

§ 2560. Discretion of Court as Regards Terms and Conditions.

Upon appointing a receiver, the court has the power to exact such terms and impose such conditions as it sees fit upon the party in whose favor the order is made. Such conditions, however, are only to be imposed in the exercise of a proper judicial discretion. The most usual exercise of the power consists in the requirement of a bond with good security, conditioned for the indemnification of the adverse party in the event the receivership has been improperly obtained. But the imposition of terms frequently covers other conditions and contingencies, as where the court sees fit to provide for the priority of certain classes of claims such as claims for supplies and charges for operation in cases of managing receiverships.¹⁰⁵ A provision in an order appointing a receiver to the effect that the appointment is made on the express condition that all demands and liabilities due or owing by the road, including damages for personal injuries, should be paid out of the earnings of the road or other funds in the hands of the receiver or out of the proceeds of a sale, may be changed by the court so as to destroy such preference.¹⁰⁶

§ 2561. Condition Assumed by Stipulation.

As the court has power to impose terms on a plaintiff as a condition of the appointment of a receiver, so may the plaintiff by a voluntary stipulation assume a burden as a condition of such appointment.

¹⁰² *Shields v. Coleman* (1895) 157 Kansas City etc. R. Co. (1892) 53 Fed. U. S. 168, 39 L. ed. 660, 15 Sup. Ct. 570. 182; *Central Trust Co. v. St. Louis etc.*

¹⁰³ *Olmstead v. Distilling etc. Co. R. Co.* (1890) 41 Fed. 551.

(1895) 73 Fed. 44.

¹⁰⁴ *Atchison etc. R. Co. v. Osborn*

¹⁰⁵ *Gunby v. Armstrong* (C. C. A.; (1906) 148 Fed. 606, 610, 78 C. C. A. 1904) 133 Fed. 417, 427, 66 C. C. A. 627. 378.

¹⁰⁶ *Farmers' Loan & Trust Co. v.*

Gibson v. Standard Automatic Gas Engine Co. (C. C. A.; 1905) 134 Fed. 799, 67 C. C. A. 445: Creditors of an insolvent corporation in their bill asked that a managing receiver be appointed for it and that all its properties be sold. Judgments had been recovered against the company by other creditors, and it was asked that these be enjoined from selling the property under execution. One of the defendants thereupon offered to buy the property at a certain price. The plaintiffs, thinking that it should bring more under a receivership sale, replied by filing a stipulation to the effect that if a receiver were appointed and the property should finally bring less than the defendant had offered, the plaintiffs would waive all claim on their part to participate as creditors in the assets. The court acting upon this stipulation then appointed a receiver at the earnest request of the stipulators. The property finally brought less than the defendant had offered and the stipulation was enforced so as to preclude the plaintiffs from sharing in the assets.

§ 2562. Interlocutory Character of Order Appointing Receiver.

An interlocutory order appointing a receiver of a railroad and providing a scheme for holding and operating the property pending the foreclosure of the mortgage is subject to modification by later order of the court and by the final decree in the same cause. No vested rights accrue to any claimant by virtue of such interlocutory order.¹⁰⁷ But of course vested rights may accrue where they are created by and under the authority of the court and in pursuance of a decree or order made in course of the proceedings.

§ 2563. Appeal from Order Appointing Receiver.

When a receiver is appointed by an interlocutory order or decree upon a hearing in equity in a district or circuit court, or upon a hearing by a judge of such a court in vacation, an appeal lies to the circuit court of appeals. The appeal, however, must be taken within thirty days from the entry of the order or decree appointing the receiver, and it has precedence in the appellate court.¹⁰⁸ The statute granting this right of appeal applies to all orders for the appointment of a receiver, whether granted upon an *ex parte* application without notice or upon a regular motion with due notice.¹⁰⁹

¹⁰⁷ *Atchison etc. R. Co. v. Osborn Allen* (C. C. A.; 1901) 48 C. C. A. 521, 109 Fed. 515, where it was held that the right of appeal exists only in those cases where a receiver is appointed at a formal hearing upon due notice. According to this idea, if a receiver is appointed upon an *ex parte* application without notice, the party aggrieved must move for a dissolution, and if the court then continues the injunction at the hearing of this motion, an appeal will lie.

¹⁰⁸ Act of April 14, 1906, ch. 1627, 34 Stat. L. 116.

¹⁰⁹ *Joseph Dry Goods Co. v. Hecht* (C. C. A.; 1903) 57 C. C. A. 64, 120 Fed. 760 (construing the Act of June 6, 1900, ch. 803, 31 Stat. L. 660). This appears to be a decidedly better construction of the statute than that adopted in *Pacific Northwest Packing Co. v.*

A party who consents to the appointment of a receiver cannot on appeal complain of the order making such appointment.¹¹⁰

Scope of Receivership.

§ 2564. Property Included in Receivership.

The order appointing a receiver should clearly define the scope and extent of the receivership, and to this end it should contain a sufficient description of the property of which the receiver is to take and obtain possession. As a court has no jurisdiction to appoint a receiver where no bill has been filed, so upon appointing a receiver in any suit, it has no power to include in the receivership property that does not belong to the party against whom the proceedings are directed, or which is not in some way brought within the jurisdiction of the court in the particular suit.¹¹¹ For instance, in a foreclosure suit the receivership is properly limited to the property covered by the mortgage; and a receivership in such case will not be considered to extend to any other property than that covered by the mortgage, unless the order appointing the receiver expressly so provides.¹¹²

Scott v. Farmers' Loan etc. Co. (C. C. A.; 1895) 16 C. C. A. 358, 69 Fed. 17: Said the circuit court of appeals of the eighth circuit: "The jurisdiction possessed by a court of chancery to foreclose a mortgage and to appoint a receiver for the mortgaged property pending the foreclosure gives it no jurisdiction or power to seize or take into its custody or control, through a receiver or otherwise, property of the debtor which is not covered by the mortgage. Nor can the court in such a suit rightfully make any order that will prevent, hinder, or delay the other creditors of the mortgagor from subjecting the property not included in the mortgage to the payment of their debts. . . . As to all property of the debtor not included in the mortgage the mortgagee is in no better plight than if he had no mortgage."

§ 2565. Nature of Property That May Be Put in Hands of Receiver.

A receiver may, under the direction of the court, take into his possession every kind of property that may be taken in execution, and also that which is equitable, if of a nature to be reduced into possession.¹¹³ A receiver may be appointed in a proper case to enforce and collect unnegotiable choses in action, though they are not capable of

¹¹⁰ *Little Rock Water Works Co. v. U. S.* 25, 26 L. ed. 637; *Central Trust Barret* (1881) 105 U. S. 516, 26 L. ed. Co. v. Worcester Cycle Mfg. Co. (1902) 523.

¹¹¹ *Hook v. Bosworth* (C. C. A.; 1894) 12 C. C. A. 208, 64 Fed. 443.

¹¹⁴ Fed. 659.

¹¹³ *Booth v. Clark* (1854) 17 How. 331, 15 L. ed. 167.

¹¹² *Smith v. McCullough* (1881) 104

manual possession. But in a case where the only property of this character was a judgment or decree of which the court itself had effectual control, the appointment of a receiver was held to be unnecessary and impracticable.¹¹⁴

§ 2566. Order Extending Scope of Receivership.

It not infrequently becomes desirable, by reason of developments occurring after the appointment of a receiver, to extend the receivership so as to make it of broader scope as regards parties or subject-matter. An order of extension can be obtained on motion in any proper case, where the parties or property in question have been brought within the jurisdiction of the court by the original bill or by a supplemental bill.¹¹⁵ Where a receiver for a railroad has been appointed under a general creditors' bill, and the receiver appointed in this proceeding has taken possession, the court will, upon the subsequent filing of a foreclosure bill by parties having a mortgage lien, extend the receivership under the creditors' bill so as to include the foreclosure proceedings, and the two suits will be thus consolidated, making the appointment of a second receivership unnecessary.¹¹⁶

An additional receiver, or receivers, may be appointed, but this step will be taken only where it appears to be essential for the protection of the rights of some of the parties interested in the property.¹¹⁷

General Effect and Incidents of Appointing Receiver.

§ 2567. Effect of Receivership on Corporate Existence and Corporate Liability.

The appointment of a receiver for a corporation does not of itself operate to dissolve the corporate body, and the corporation will still exist and may exercise any of its franchises, if such course does not interfere with the rightful management of the corporate affairs by the receiver and the same has not been enjoined by the court upon appointing the receiver.¹¹⁸ Even the transfer of possession to a

¹¹⁴ *Scruggs' Exr. v. Memphis etc. R. Co.* (1883) 108 U. S. 368, 27 L. ed. 756.

¹¹⁵ *Appleton Waterworks Co. v. Central Trust Co.* (1899) 93 Fed. 286, 35 C. C. A. 302; *Mercantile Trust Co. v. Missouri etc. Co.* (1889) 41 Fed. 8.

¹¹⁶ *St. Louis etc. R. Co. v. Central Trust Co.* (C. C. A.; 1901) 49 C. C. A. 529, 111 Fed. 669; *Lloyd v. Chesapeake etc. R. Co.* (1895) 65 Fed. 351. See *Central Trust Co. v. Wabash etc. R. Co.* (1885) 23 Fed. 863.

¹¹⁷ *Wabash etc. R. Co. v. Central Trust Co.* (1884) 22 Fed. 272.

¹¹⁸ *Chemical Nat. Bank v. Hartford Deposit Co.* (1896) 161 U. S. 1, 40 L. ed. 595; *Johnson v. Southern Bldg. etc. Assoc.* (1899) 99 Fed. 646; *Second Nat. Bank v. New York Silk Mfg. Co.* (1882) 11 Fed. 532; *Fidelity Insurance etc. Deposit Co. v. Norfolk etc. R. Co.* (1902) 114 Fed. 389.

receiver will not relieve the corporation of liability, unless the possession of the receiver is exclusive and control is entirely vested in him.¹¹⁹

§ 2568. Election of Corporate Officers.

The putting of property of a railroad into the hands of a receiver does not necessarily have the effect of giving the court jurisdiction over the matter of the election of corporate officers, and a meeting may be permitted for this purpose notwithstanding the existence of the receivership.¹²⁰

§ 2569. Effect of Receivership on Pending Suits.

Actions pending against the person over whose property a receiver is appointed do not abate upon such appointment. Nor does the right to defend or prosecute pending suits vest in the receiver by virtue of his appointment. The receiver has no status in such suits except as he is properly made a party thereto, and he has only such powers as the court expressly confers on him.¹²¹ It follows that one who has commenced an action, before the appointment of a receiver of the debtor's property, may prosecute the same to judgment, and the judgment so obtained is a proper claim against the receivership. The correct procedure is for the plaintiff in such suit to file his judgment as a claim in the receivership proceeding. And the claim may be so filed before the judgment is actually obtained, without prejudice to the right further to prosecute the suit.¹²² If the judgment obtained in a suit prosecuted against the company whose property has been put in the hands of a receiver is for any reason invalid, it will not be allowed as a claim in the receivership proceedings; and the receiver may of course take advantage of the invalidity of the judgment.¹²³

§ 2570. When Pending Suit Abates.

Where, in addition to the appointment of a receiver, a corporation is dissolved, or otherwise destroyed, pending suits by or against the

¹¹⁹ *Railroad Co. v. Brown* (1873) 17 Wall. 445, 21 L. ed. 675. *Second Nat. Bank v. New York Silk Mfg. Co.* (1882) 11 Fed. 532. See *Calhoun v.*

¹²⁰ *Taylor v. Philadelphia etc. R. Co.* (1881) 7 Fed. 381. *Lanaux* (1888) 127 U. S. 634, 639, 32 L. ed. 297, 299, 8 Sup. Ct. 1345 (*semble*).

¹²¹ *Wilder v. City of New Orleans* (C. C. A.; 1898) 87 Fed. 843, 31 C. C. Car Works (1893) 53 Fed. 853.

¹²² *Pine Lake Iron Co. v. La Fayette* A. 249; *Mercantile Trust Co. v. Pittsburgh etc. R. Co.* (1887) 29 Fed. 732; ¹²³ *Pendleton v. Russell* (1892) 144 U. S. 640, 36 L. ed. 574.

corporation necessarily abate in the absence of a statute to the contrary; ¹²⁴ and any judgment obtained in the action against the dissolved corporation is invalid, unless the receiver is made a party to the proceedings. ¹²⁵

§ 2571. Making Receiver Party to Pending Suit.

If a receiver desires to be made a party to a pending suit, or to be substituted as plaintiff or defendant, or to intervene therein, the court will usually entertain an application by him to that effect. ¹²⁶ But the adverse party has no right to insist on such a change of parties, and a refusal of the trial court to allow it at the suggestion of the adverse party is not reversible error. ¹²⁷

1. *Pendleton v. Russell* (1892) 144 U. S. 640, 36 L. ed. 574; 12 Sup. Ct. 745: Upon appointment of a receiver for a corporation, he found a suit pending against it on appeal in the supreme court. He thereupon obtained permission of his court to employ, and did employ, counsel to represent the company upon the appeal. Upon the suit being there decided in favor of the company and reversed, the receiver procured the mandate to be sent to the lower court in order that the judgment of that court might be vacated in accordance with the mandate. It was held that such participation in the litigation did not make the receiver a party to the action.

2. *Mercantile Trust Co. v. Pittsburgh etc. R. Co.* (1887) 29 Fed. 732: In discussing the effect of the appointment of a railroad receiver in a federal court on an action pending in a state court, it was said: "The appointment by this court of the receivers did not oust the jurisdiction which the court of common pleas had previously acquired of the proceedings against the railroad company instituted by the petitioner for the ascertainment of his damages, nor did it operate as a stay thereof. Neither was the petitioner bound to bring in the receivers as defendants, as he was seeking no relief against them. It was their business to intervene, and make defense if they wished to do so. The master was therefore correct in his determination that the petitioner's rights as a judgment creditor are not to be denied recognition simply because he proceeded in the prosecution of his suit without making the receivers parties, or notice to them, and without leave of this court."

§ 2572. Receiver Concluded by Prior Steps in Litigation.

A receiver upon coming into a suit previously instituted against the company over which he is made receiver is bound by the record

¹²⁴ *First Nat. Bank v. Colby* (1874) interest in the subject-matter of the 21 Wall. 609, 22 L. ed. 687; *Greeley v. Smith* (1845) 3 Story, 657. suit that ought to be protected in such proceeding. *Bowen v. Needles Nat. Bank*

¹²⁵ *Pendleton v. Russell* (1892) 144 U. S. 640, 36 L. ed. 574. (1896) 76 Fed. 177.

¹²⁶ *Perry v. Godbe* (1897) 82 Fed. 141. ¹²⁷ *Missouri etc. Trust Co. v. German Nat. Bank* (C. C. A.; 1896) 77 Fed. 117, 23 C. C. A. 65.
A receiver of a national bank will be permitted to intervene when he has an

as it exists at that time. Thus a default suffered by the company prior to the appointment of the receiver is, in the absence of fraud or collusion, as binding on him as if he had suffered the default himself.¹²⁸

§ 2573. Right of Receiver to Counterclaim or Set Off against Intervenor.

A receiver does not, by virtue of his appointment merely, become a party defendant to the litigation in which he is made receiver; and he cannot maintain, without regular service of process at least, a counterclaim or set off against an intervening petitioner who has come in on a reference before the master to establish a claim held by himself. The proper proceeding is for the receiver, by leave of the court, if necessary, to sue independently in his own name.¹²⁹

¹²⁸ *Perry v. Godbe* (1897) 82 Fed. 141. ¹²⁹ *Youtsey v. Hoffman* (1901) 108 Fed. 693.
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CHAPTER LXII.

RECEIVERS (*continued*).

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Who May Be Receiver.

§ 2574. Receiver Must Be Disinterested.

The person appointed receiver should, as a rule, be an independent and disinterested person, and impartial and indifferent as between the parties to the controversy. A receiver ought not to be appointed to represent the particular interests of one class, nor to represent one interest out of a class of interests. He should not have such personal interest as would interfere with an unbiased and impartial exercise of his duties.¹ The receiver is solely the officer of the court. He must be, in the full sense of the term, the representative of the court. He is in no way the representative of either party. His past relations, the influences that suggest and procure his appointment, his sympathies from whatever cause, must not be such as to predispose him either way.² He should not be interested in the determination of the suit one way or the other, or associated or connected with any one who is.³

§ 2575. Parties Ineligible Because of Interest.

Persons who are of counsel for either of the parties or who have been identified with the management that brought about the embarrassment resulting in the receivership are considered ineligible to appointment as receivers.⁴ The circumstance that a particular person is related to some of the very numerous parties to a suit will not prevent his appointment as receiver where he is exceptionally well qualified for the duties of the office and the appointment is sanctioned by the great majority of those who have a right to be heard in such matter.⁵

¹ Booth v. Clark (1854) 17 How. 330, 15 L. ed. 167; Davis v. Gray (1872) 16 Wall. 203, 21 L. ed. 447; Atkins v. Wabash etc. R. Co. (1886) 29 Fed. 161; Taylor v. Life Assoc. of America (1890) 3 Fed. 469; Meier v. Kansas Pacific R. Co. (1878) 5 Dill. 479.
² Wood v. Oregon Development Co. (1893) 55 Fed. 901.
³ Finance Co. v. Charleston etc. R. Co. (1891) 45 Fed. 436.
⁴ Finance Co. v. Charleston etc. R. Co. (1891) 45 Fed. 436; State Trust Co. v. Nat. Land etc. Co. (1893) 72 Fed. 575.
⁵ Bowling Green etc. Co. v. Virginia etc. Co. (1904) 133 Fed. 186; Ralston v. Washington etc. R. Co. (1895) 65 Fed. 557.

§ 2576. Eligibility of Corporate Officer or Stockholder.

Officers, directors, or stockholders in a corporation will not be appointed to the office of receiver of the corporation unless the case is exceptional, and then only on the consent of parties whose interests are to be intrusted to their charge.⁶ However, the rule that disqualifies officers and stockholders and other persons interested in or connected with the management of the business over which the receivership is to be appointed is not an unbending rule; and the matter of the eligibility of any particular person is one to be determined by judicial discretion.⁷ An officer who has speculated in the stock of a corporation will not be appointed a receiver of its properties, especially where he appears to be short of the stock in a deal on the stock exchange; for his interest in such transaction would be furthered by the depreciation of the stock, while his duty as receiver would require him to do everything possible to enhance its value.⁸

§ 2577. When Interested Party Eligible to Be Receiver.

The rule requiring the receiver to be indifferent and disinterested as between the parties does not apply where there is no question as to who is entitled to the property in litigation. If the right is wholly determined in favor of one party, it is proper that the receiver should represent or be identified in interest with that party.

Shainwald v. Lewis (1881) 8 Fed. 878: In a creditor's suit, the defendant was clearly shown to have been guilty of fraud and admittedly had transferred and secreted property which he refused to surrender, on the order of the court, to satisfy the money decree rendered against him. The court thereupon appointed a receiver and compelled the defendant to execute a general assignment to such receiver. It was held that this was not a case where the receiver should be a disinterested person. His duty was to ferret out the fraudulent transactions of the defendant and recover that property for the benefit of the creditors. Consequently, it was desirable that the receiver should be the interested and zealous adversary of the defendant.

Furthermore, the court indicated that the receiver might properly employ, as his counsel, the lawyer who had represented the plaintiff in the bill. The case was quite different from that which is presented in foreclosure suits and suits for the dissolution of a partnership. In these situations the receiver should be disinterested and should hold indifferently for the party finally adjudged to be

⁶ *Atkins v. Wabash etc. R. Co.* (1886) President of corporation appointed as receiver for it, *Davis v. Duncan* (1884) 29 Fed. 161. See *Buck v. Piedmont etc. Ins. Co.* (1880) 4 Hughes 415, 4 Fed. 19 Fed. 481.

⁷ *Fowler v. Jarvis-Conklin etc. Co.* (1895) 67 Fed. 24. (1894) 63 Fed. 888 (1894) 66 Fed. 14.

⁸ *Olmstead v. Distilling & Cattle Feed-*

entitled. But here there was no question as to the right to the fund. That had been adjudged against the defendant.

§ 2578. Qualifications of Operating Receiver.

The matter of the qualifications of the receiver is one of great moment and delicacy in situations requiring special knowledge and aptitude for the business, as where a railroad is to be taken in hand and operated in receivership proceedings. In choosing receivers to fill such responsible position, the courts are often compelled to look more to their special qualifications for the particular business, than to their relation or connection with the enterprise prior to the receivership.

Farmers' Loan etc. Co. v. Northern Pac. R. Co. (1894) 61 Fed. 546: Application was made for the removal of a railroad receiver on the ground that he was and had long been an officer of the company and as such was responsible, with others, for the state of affairs that brought the company into straits. However, it appeared that he was entirely competent and of much experience in this business, furthermore that his appointment as receiver had been made with the consent of the great majority of those interested in the affairs of the road. In refusing to remove him, Jenkins, Circuit Judge, said: "A receiver should, in a large sense, be indifferent, as between the various interests involved. He should have no such personal interest as would interfere with an unbiased and impartial exercise of his duties as receiver. I quite agree with the doctrine that, in general, one who was a director or managing officer of a corporation at the time of its suspension ought not to be appointed its receiver. . . . The rule, however, is not inflexible, and is necessarily departed from when it is apparent, in view of the knowledge and familiarity of a particular person with the estate taken in charge by the court, that its best interests will be promoted by his appointment. . . . The case of a railway furnishes, perhaps, the most notable instance of the necessity of departure from the rule. Railway management has become a profession. A railway is not a toy that may be trifled with. Its management requires great financial and executive ability, and the practical experience of years. Railway management stands apart as a specialty. The ablest men in other professions and in other walks of life would probably fail in the successful direction of the affairs of a railway, if they are wanting in that knowledge of its needs and requirements that may only be obtained by long experience in its practical management and operation."

§ 2579. Place of Residence as Affecting Eligibility.

The courts are disinclined to appoint a non-resident to be receiver, and certainly the appointment of a non-resident is improper where he intends and is expected to remain in a remote state and beyond the jurisdiction of the court.⁹ But non-residence alone is not an absolute

⁹ *Maier v. Kansas Pacific R. Co.* (1878) 5 Dill. 476, Fed. Cas. No. 9,395.

disqualification for the office of receiver, and a non-resident may be appointed if he is a desirable person on other grounds.¹⁰ The circumstance that a person is not a citizen of the particular state in which a railroad is incorporated and where it wholly or mostly lies does not disqualify him to be appointed receiver.¹¹

§ 2580. Interest in Reorganization Scheme.

While the receivership should be impartial between all the interests represented in the suit, it has sometimes been held permissible for the receiver to become a member of a reorganization committee gotten together for the purpose of putting the company on its feet again.¹² But where there are conflicting plans of reorganization, and where trouble between different interests is foreshadowed, he should not be identified with either. In the case noted below, the court required its receiver, under such conditions, to resign from the reorganization committee.¹³

§ 2581. Appointment of Same Person in Federal and State Court.

A proper person already appointed as receiver in a state court may well be appointed as receiver in the federal court of other property affecting the same or similar interests, there being no such conflict between the courts as would deprive the federal court of jurisdiction.¹⁴ But the federal court will not, on grounds of comity, appoint as receiver one who has already been appointed receiver in a state court, where it appears that the appointment by the state court was suggested and procured by a particular party in its own interest and not in the interest of all the creditors.¹⁵

Title, Interest, and Possession of Receiver.

§ 2582. Fiduciary Nature of Receiver's Interest.

The receiver is entitled to have and hold for the purposes of his trust all property and funds belonging to the person or company of whose property he is made general receiver.¹⁶ His interest is that

¹⁰ *Bayne v. Brewer Pottery Co.* (1897) 82 Fed. 391; *Stanton v. Alabama etc. R. Co.* (1875) Fed. Cas. No. 13,296.

¹¹ *Farmers' Loan & Trust Co. v. Cape Fear etc. R. Co.* (1894) 62 Fed. 675.

¹² *Clarke v. Central R. etc. Co.* (1893) 66 Fed. 16.

¹³ *Fowler v. Jarvis-Conklin Mortg. Co.* (1894) 63 Fed. 888.

¹⁴ *State Trust Co. v. National Land etc. Co.* (1893) 72 Fed. 575.

¹⁵ *Phinizy v. Augusta etc. R. Co.* (1893) 56 Fed. 273.

¹⁶ *Tilford v. Atlantic Match Co.* (1905) 134 Fed. 924.

A check for a retainer's fee was delivered by the defendant company to one B. its regularly retained counsel. Before the

of a person occupying a fiduciary relation, and he will not be permitted to acquire any rights antagonistic to those of the parties who are interested in the trust estate unless he shows entire good faith.¹⁷ He is not a purchaser for value, and his rights in the property that comes into his hands as receiver are not greater than those possessed by the insolvent in whose right he claims.¹⁸ On the other hand, the receiver is not an assignee and the principles of common law applicable to assignees do not define or determine the character of a receiver's possession or its effect upon the rights of those interested in the property in their possession.¹⁹

§ 2583. Representative Capacity of Receiver.

Receivers are not individually responsible upon their official contracts or for torts committed by their subordinates. Such liability as they thus incur is incurred in their official capacity, and judgments against them are payable only from the funds in their hands. As has been said by Mr. Justice Brown: "Actions against the receiver are in law actions against the receivership, or the funds in the hands of the receiver, and his contracts, misfeasances, negligences, and liabilities are official, and not personal, and judgments against him as receiver are payable only from the funds in his hands."²⁰

A receiver is not liable for a tort committed prior to his appointment by the railroad over which he is made receiver.²¹

§ 2584. Continuity of Receivership.

Every receivership is a unit regardless of mutations in the personnel of the receivers. It has been observed that a receivership is, in this respect, in the nature of a corporation sole.²² Therefore if one receiver becomes officially liable, his successor in the same proceedings will be likewise bound. So long as the property remains in the

check was collected a receiver was appointed for the company and B had notice of this fact. He then collected the money on the check. On the motion of the receiver he was ordered to turn the money over to the receiver. *Bowker v. Haight & Freese Co.* (1906) 146 Fed. 257.

¹⁷ *Farley v. Hill* (1893) 150 U. S. 575, 37 L. ed. 1187.

¹⁸ *Auten v. City Electric etc. R. Co.* (1900) 104 Fed. 395.

¹⁹ *New York etc. R. Co. v. New York etc. R. Co.* (1893) 58 Fed. 268, 278.

²⁰ *McNulta v. Lochridge* (1891) 141 U. S. 327, 35 L. ed. 796, 12 Sup. Ct. 11; *American Bonding etc. Co. v. Baltimore etc. R. Co.* (C. C. A.; 1903) 60 C. C. A. 52, 124 Fed. 866, 877. See *Farmers' Loan etc. Co. v. Central R. Co.* (1880) 7 Fed. 537; *Davis v. Duncan* (1884) 19 Fed. 477.

²¹ *Finance Co. v. Charleston etc. R. Co.* (1891) 46 Fed. 508; *Northern Pac. R. Co. v. Heflin* (C. C. A.; 1897) 83 Fed. 93, 27 C. C. A. 460.

²² *Central etc. Co. v. Farmers' etc. Co.* (1902) 113 Fed. 405, 413.

custody of the court and is administered through the agency of a receiver, such receivership is continuous and uninterrupted until the court relinquishes its hold upon the property. The receivership is but one thing, and there is a continuity of succession as between different receivers until the proceedings are finally terminated.²³

§ 2585. Possession of Receiver Is Possession of Court.

The receiver, as is often said, is considered to be the hand of the court, and property in his possession is in the custody of the court. He represents neither party, and acts for neither party; but merely holds the property for disposition at the end of the litigation for the benefit of all, or for the benefit of the particular party who may appear to be entitled.²⁴ It follows that the appointment of a receiver does not oust any party of his right to the possession, and the possession of the receiver is in no sense hostile or inconsistent with the right or interest of any party. He merely retains it for the benefit of the one who ultimately establishes his right thereto. When the party entitled to the property has been ascertained, the receiver is considered his receiver.²⁵ The property is merely taken by the court and is put into the hands of its officer to hold for the benefit of whom it may concern.²⁶

§ 2586. Title of Receiver Dates from Order of Appointment.

It is fully established that the status of the property and the relations towards it of all parties interested in it are fixed by the order appointing the receiver.²⁷ The title and interest of the receiver has its inception in such order. The moment the receiver is appointed he becomes the officer or agent of the court, and from that time the property committed to him is in custody of law, and the court has power to preserve and protect it. It has been observed that if the jurisdiction of the court over the property did not attach

²³ *McNulta v. Lochridge* (1891) 141 U. S. 327, 35 L. ed. 796, 12 Sup. Ct. 11.

²⁴ *Union Bank of Chicago v. Kansas City Bank* (1890) 136 U. S. 223, 236, 34 L. ed. 341, 346; *In re Tyler* (1893) 149 U. S. 164, 37 L. ed. 689; *Central Trust Co. v. St. Louis R. Co.* (1890) 41 Fed. 555; *DeVisser v. Blackstone* (1868) 6 Blatchf. 235; *In re Merchants' Ins. Co.* (1871) 3 Biss. 165. See *Naumburg v. Hyatt* (1885) 24 Fed. 898; *Central Trust Co. v. Wabash etc. R. Co.* (1885) 23 Fed. 863, 868.

²⁵ *Wiswall v. Sampson* (1832) 14 How. 65, 14 L. ed. 323; *Booth v. Clark* (1855) 17 How. 322, 15 L. ed. 164; *Chicago Union Bank v. Kansas City Bank* (1890) 136 U. S. 223, 34 L. ed. 341, 10 Sup. Ct. 1013.

²⁶ *Central Trust Co. v. Worcester Cycle Mfg. Co.* (1899) 35 C. C. A. 547, 93 Fed. 712.

²⁷ *Commonwealth Roofing Co. v. North American Trust Co.* (C. C. A.; 1905) 68 C. C. A. 418, 135 Fed. 984, 990.

contemporaneously with the order appointing the receiver, the purpose of the court in appointing a receiver might be defeated by the failure of the person appointed to accept the position, by his inability to give bond, or by the interim acts of strangers in securing judgments or making other efforts to obtain advantage.²⁸

§ 2587. Qualification of Receiver by Giving Bond.

The order appointing the receiver usually makes his right and title contingent upon his subsequent qualification and upon the giving of a bond by him. Where the order of appointment requires the receiver, before entering on the duties of his office, to execute a bond, and such bond is subsequently executed and approved by the judge, the receiver's official tenure is held to relate back to the date of the order of appointment;²⁹ and judgments obtained by third parties in the period between the appointment of the receiver and his subsequent qualification are invalid and create no lien.³⁰

§ 2588. Property Beyond Jurisdiction of Court.

The principle just stated does not apply as regards property situated in another state and beyond the jurisdiction of the court appointing the receiver. The status of such property depends on the law and policy of the state where it is located.³¹

§ 2589. Actual Seizure by Receiver Unnecessary.

From the doctrine that the title of the receiver upon qualification relates back to the order of appointment, it follows that actual manual seizure by the receiver is not essential to prevent the acquisition of liens by others upon the property by assignment, judgment, execution, attachment, or otherwise.³² It appears to be the rule in some of the state courts that the title of the receiver dates from the time of his

²⁸ *Connecticut River Banking Co. v. Rockbridge Co.* (1895) 73 Fed. 709, *affirmed* *Temple v. Glasgow* (1897) 80 Fed. 441, 25 C. C. A. 540; *Fidelity Ins. etc. Co. v. Roanoke Iron Co.* (1896) 81 Fed. 439. See *Commonwealth Roofing Co. v. North American Trust Co.* (C. C. A.; 1906) 68 C. C. A. 418, 135 Fed. 985.

²⁹ *Horn v. Pere Marquette R. Co.* (C. C.; 1907) 151 Fed. 633; *Illinois Steel Co. v. Putnam* (C. C. A.; 1895) 15 C. C. A. 556, 68 Fed. 515; *Adams v. Trust Co.* (C. C. A.; 1895) 15 C. C. A. 1, 66 Fed. 617. ³¹ *Zacher v. Fidelity Trust etc. Co.* (C. C. A.; 1901) 45 C. C. A. 490, 106 Fed. 593; *Morrill v. American Reserve Co.* (C. C. A.; 1907) 151 Fed. 305.

³² *Horn v. Pere Marquette R. Co.* (C. C.; 1907) 151 Fed. 633; *Connecticut River Banking Co. v. Rockbridge Co.* (1895) 73 Fed. 709; *Temple v. Glasgow* (1897) 80 Fed. 441, 25 C. C. A. 540; *East Tenn. etc. R. Co. v. Atlanta etc. R. Co.* (1892) 49 Fed. 608, 610, 15 L.R.A. 109.

qualification or from the time when he takes actual possession,³³ but this notion does not prevail in the federal courts.

§ 2590. Order for Receiver to Take Possession.

The mere appointment of the receiver does not transfer possession to him;³⁴ but the appointment of a receiver carries with it, by implication, the duty on his part of taking possession, and the further duty on the part of those in possession of yielding such possession.³⁵ It is customary to insert in the order appointing a receiver instructions to the effect that the receiver shall take possession of the property in question and that individuals having charge of the property and affairs of the insolvent shall turn the same over to the receiver upon demand.

American Construction Co. v. Jacksonville etc. Co. (1892) 52 Fed. 937: The order ran that the receiver should be given possession of "all and every part of the properties, interests, effects, moneys, receipts, earnings," etc., of the road over which he was made receiver, and that "all books, vouchers, and papers touching the operation of said railroad," as well as its "books of account," should be turned over to him. This was held to include the corporate seal of the company and all books and accounts of every kind bearing on the past as well as the present and future.

§ 2591. Duty of Person in Possession to Surrender to Receiver.

The servant, agent, or employee of the insolvent, or any other individual, who refuses upon proper order of the court to turn over property to the receiver, is guilty of a contempt and will be punished for his disobedience.³⁶ It has been held that an officer of an insolvent corporation has no right to retain notes or books of the corporation on the claim that he has a lien or mere equity in them. He should deliver the property and look to the court to protect his alleged lien.³⁷

§ 2592. Summary Petition to Enforce Delivery of Property to Receiver.

If property is wrongfully withheld from a receiver by a defendant or by his agent, servant, or employee, or by any other person who is a party to the suit, a proper procedure whereby to enforce the sur-

³³ *Bank of Woodland v. Heron* (1898) 120 Cal. 614, 52 Pac. 1006; *Everett v. Neff* (1867) 28 Md. 176; *Farmers' Bank v. Beaton* (1836) 7 Gill & J. 421, 28 Am. Dec. 226.

³⁴ *Booth v. Clark* (1854) 17 How. 331, 15 L. ed. 167.

³⁵ *Highland Ave. etc. R. Co. v. Columbian Equipment Co.* (1898) 168 U. S. 630, 42 L. ed. 606.

³⁶ *American Const. Co. v. Jacksonville etc. Co.* (1892) 52 Fed. 937.

³⁷ *Tinsley v. Anderson* (1898) 171 U. S. 101, 43 L. ed. 91, 18 Sup. Ct. 905.

render of the property is by a summary petition in the cause. Such petition is filed by the receiver, and upon a proper showing by him the court will order the person having possession of the property to surrender it. The proceeding by summary petition has also been held to be proper where the person having possession of the property holds as a trustee of the person or corporation over whose property the receiver has been appointed.

Miles v. New South etc. Ass'n (1899) 95 Fed. 919: A receiver was appointed for a building and loan association, and as such he became entitled to all its assets. A certain trust company held in its hands as trustee a large amount of the assets of the association. These were held to secure bonds issued by the association and also to secure other creditors. The receiver demanded those assets of the trust company, and upon its refusal to surrender the same, filed a petition in the cause for an order compelling the trust company to turn such assets over. It was insisted for the trust company that the court had no jurisdiction to proceed in this summary way and that the receiver should be required to bring an independent suit. But the order was granted nevertheless. Shelby, Circuit Judge, stated the principle here applicable in a full and quite satisfactory way: "The practice of requiring the surrender of property to the receiver by summary motion or petition is well recognized where it is held by the attorneys, agents, and employees of the defendant. The same practice seems not improper where the property in question is held by a defendant in the motion, not for himself, but as trustee, and so, in a sense, as the agent, for those interested in the assets, including the defendant in the case. In modern litigation in equity a defendant's property may be in the possession of hundreds of agents and bailees, holding under various agreements, and it is not reasonable that a receiver appointed of all the assets should be required to sue each bailee and agent separately, or that all should be made parties to the main suit, should they merely refuse to surrender the assets."

§ 2593. When Receiver Proceeds by Independent Suit.

When a receiver claims a right to have possession of property that is withheld from him by one who is not an actual party to the receivership proceeding, and who is not an agent, servant, or employee of such, the question whether the receiver can proceed against such stranger by petition in the cause wherein he was appointed receiver or must bring an independent suit, depends upon the question as to when and how the stranger acquired possession. If he obtained possession and acquired his rights before the receiver was appointed, the receiver cannot proceed summarily by petition but must bring an independent action or suit. Here the party asserting the right adverse to the receiver is entitled to say, "as to that fund, I claim adversely and demand that you proceed in the ordinary way to try the question

whether my prior possession can be rightfully disturbed by an order in a case to which I was not a party."³⁸

On the other hand, if the stranger obtained possession and acquired his rights subsequent to the appointment of the receiver, and consequently after the receiver's right to possession had attached, then the receiver may proceed by petition in the cause. The time of the sequestration or equitable seizure effected by the appointment of the receiver is determinative on this point. One who acquires and holds possession of the receivership property after the court has given the receiver the right to possession holds in disobedience to the orders of the court and is therefore subject to its jurisdiction in that cause. The right of the receiver to maintain such a petition does not depend upon whether the actual possession of the receiver has been disturbed but upon the question whether the other party is obstructing and preventing the receiver from taking actual possession. The principle is the same whether the property is of a tangible kind or is merely a chose in action, such as a bank deposit.³⁹

If a receiver proceeds by petition or motion in the receivership cause against a stranger who withholds possession, and the answer of such person to the petition sets up a right or title in himself adverse to that of the receiver, and such person claims a right of jury trial, the court may properly dismiss the petition and remit the receiver to his action at law.⁴⁰

§ 2594. Bringing Stranger in as Defendant in Main Suit.

Another mode of procedure by which the receiver may get control over the property appertaining to the receivership in the possession of a person who is not a party to the suit, is for the plaintiff in the original bill to make such party a defendant in the suit by supplemental or amended bill, and then on motion to have the receivership extended to such property and procure an order for him to surrender it. But this procedure is not always practicable or convenient.⁴¹

§ 2595. Waiver of Informality as to Mode of Procedure.

If the receiver improperly proceeds by petition in a situation where he ought to proceed by an independent suit, the objection should be

³⁸ *Wheaton v. Daily Tel. Co.* (C. C. 71 Fed. 400, 18 C. C. A. 193; *Bibber v. A.*; 1903) 59 C. C. A. 427, 124 Fed. 61. *White Co. v. White River etc. R. Co.*

³⁹ *Horn v. Pere Marquette R. Co.* (1901) 107 Fed. 176.

(C. C. A.; 1907) 151 Fed. 629, 630. ⁴¹ *Miles v. New South etc. Assoc.*

⁴⁰ *Sullivan v. Colby* (C. C. A.; 1896) (1899) 95 Fed. 919, 920.

made by motion, demurrer, or plea. By answering to the merits the defendant in the petition submits to the jurisdiction of the court in this respect and apparently waives the defect as to the mode of proceeding.⁴²

§ 2596. Court's Control over Receiver's Independent Suit.

A court that has authorized its receiver to institute an independent action against a stranger may entertain a motion made by the latter to have the action in question dismissed. But where the ground of the application is such that it could be put in as a defense to that action, the application will not be granted except in a very clear case.⁴³

Interference with Possession of Receiver.

§ 2597. Nature of Receiver's Possession.

As property in the possession of a receiver is considered to be in the possession of the court that appointed him, any attempt to interfere with the property in his hands is a contempt of court.⁴⁴ The court will at any time, upon a proper showing, protect the possession of a receiver; and to this end it will entertain contempt proceedings against the party interfering with the receiver's possession, or use its injunctive process upon any proper occasion, as where an attempt is made to seize the property or to levy a tax warrant thereon or where continuous trespasses are made upon the property.

§ 2598. Court's Protection of Receiver.

A combination and conspiracy among the employees of a railroad receiver to hinder and delay operation of the road, when followed by overt acts of intimidation and violence, will be punished as a contempt of court.⁴⁵ On the principle of protecting its receiver in the possession and use of street railway property committed to his care, the court may enjoin another railroad company from taking proceedings to condemn to its use land held by the receiver. And, *a fortiori*, it will enjoin an appropriation attempted without color of legal proceedings.⁴⁶

⁴² *Horn v. Pere Marquette R. Co.* (1886) 27 Fed. 443; *United States v. Murphy* (1890) 44 Fed. 39; *Thomas v. C. C. A.*; 1907) 151 Fed. 629, 630.

⁴³ *Pakradooni v. Storey Cotton Co.* Cincinnati etc. R. Co. (1894) 62 Fed. (1907) 151 Fed. 607.

⁴⁴ *Tinsley v. Anderson* (1898) 171 U. S. 101, 43 L. ed. 91, 18 Sup. Ct. 805; *In re Swan* (1893) 150 U. S. 637, 37 L. ed. 1207, 14 Sup. Ct. 225; *In re Higgins* (1886) 27 Fed. 443.

⁴⁵ *In re Higgins* (1886) 27 Fed. 443. ⁴⁶ *Fidelity Trust etc. Co. v. Mobile etc. R. Co.* (1892) 53 Fed. 687.

§ 2599. Usual Injunction against Interfering with Receiver.

The usual injunction granted upon the appointment of a receiver for an insolvent corporation runs to the effect that the directors, stockholders, agents, and servants of the company, and all other persons having notice of the order, shall refrain from interfering with the receiver in the discharge of his duties or with the property of the corporation, and that said directors, officers, and agents shall refrain from collecting any of the debts or demands of the company and from disposing of or transferring any of its property.⁴⁷

§ 2600. Receiver's Proceeding to Obtain Injunction.

A receiver desiring to obtain the assistance of an injunction to protect his possession or to prevent any unwarranted interference with his management of the receivership may proceed either by a petition in the cause or by an original bill. If the person sought to be enjoined is a party to the suit, or in privity with a party, the receiver naturally proceeds by petition in the cause. If the person is a stranger, either mode of procedure may be adopted. But in determining which mode should be pursued the purpose of the court will be to guard against any undue advantage being taken of the defendant. He must, it is held, have full opportunity to assert his defense. If this right can be properly guarded only by an original proceeding by bill and answer, this mode must be adopted. The question rests in the discretion of the court. If no right of the defendant can be prejudiced by proceeding upon petition, this method will be sanctioned.⁴⁸

§ 2601. Proceeding in Case of Conflicting Receiverships.

If a controversy arises between two receivers of different properties appointed by the same court concerning the right to possession of property in the hands of one of them, the proper mode of proceeding is by petition in the cause wherein the latter receiver was appointed, asking the court that he be ordered to turn the property over.⁴⁹

⁴⁷ *Williams v. Hintermeister* (1886) (C. C. A.; 1900) 103 Fed. 227, 43 C. C. A. 26 Fed. 889; *Sands v. Greeley* (C. C. A.; 189) 189; *Bibber-White Co. v. White etc. R.* 1898) 31 C. C. A. 424, 88 Fed. 131; *Johnson v. Southern Bldg. etc. Co.* (1899) 99 Fed. 647.

⁴⁹ *Comer v. Felton* (C. C. A.; 1894) 61 Fed. 731, 10 C. C. A. 28.

⁴⁸ *Lake Shore etc. R. Co. v. Felton*

§ 2602. Exemption of Property in Hands of Receiver.

One manifestation of the principle by which property in the possession of the receiver is considered to be *in custodia legis* and therefore under the protection of the court is found in the rule that property in the hands of a receiver is exempt from judicial process, except, of course, so far as may be permitted by the court itself that appointed the receiver. It is a general rule that property in the hands of a receiver cannot be sold under attachment or execution, unless leave of the court before which the receivership proceedings are pending is first duly obtained. The leading authority on this point, so far as the federal courts are concerned, is found in the following case; and it will be noted that the doctrine of this case goes to the extent of denying any validity whatever to an execution or attachment sale of property in the hands of a receiver, though the levy may be made prior to the time when the receiver acquires possession. The mere fact that the receiver takes possession operates as an inhibition upon proceedings instituted in any other court to subject the property.

Wiswall v. Sampson (1852) 14 How. 52, 65, 14 L. ed. 322, 328: A bill was filed by a creditor to set aside a conveyance of real property as fraudulent. A receiver was asked for, but before one was appointed an execution was levied on the land at the instance of another creditor. Subsequently a decree was entered in the equity suit declaring the conveyance in question void and appointing a receiver. The receiver then took possession of the land; and while he was acting as receiver, a sale was made under the execution that had been levied prior to the appointment of the receiver. This sale under execution was held to be void, because the land was then in the possession of the receiver and therefore in the custody of the court.

Said Mr. Justice Nelson: "When a receiver has been appointed, his possession is that of the court, and any attempt to disturb it, without the leave of the court first obtained, will be a contempt on the part of the person making it. . . . The doctrine that a receiver is not to be disturbed extends even to cases in which he has been appointed expressly without prejudice to the rights of persons having prior legal or equitable interests. And the individuals having such prior interests must, if they desire to avail themselves of them, apply to the court either for liberty to bring ejectment, or to be examined *pro interesse suo*; and this, though their right to the possession is clear."⁵⁰

⁵⁰ Among many subsequent cases in *Hempfield R. Co.* (1870) 2 Abb. (U. S.) which *Wiswall v. Sampson* has been approved and followed are these: *Heid- 155, Fed. Cas. No. 5,011; Perego v. Bone-*
steel (1860) 5 Biss. 69, Fed. Cas. No. *ritter v. Elizabeth etc. Co.* (1884) 112 U. 10,976; *Thompson v. Scott* (1876) 4 Dill. 8, 303, 28 L. ed. 732, 5 Sup. Ct. 139; 509, 512, Fed. Cas. No. 13,975; *Kennedy*
Porter v. Sabin (1893) 149 U. S. 490, *v. Indianapolis etc. R. Co.* (1880) 2 37 L. ed. 818, 13 Sup. Ct. 1011; *Fox v. Flipp* 707, 3 Fed. 99; *Hickox v. Holla-*

§ 2603. Tax Warrant Not Leviable on Property in Hands of Receiver.

Perhaps the most striking illustration of the principle in question is found in cases where attempts have been made to subject the property in the hands of a receiver to the payment of taxes. It has been contended that the lien for taxes is of such high nature that even the possession of the court ought to yield so far as to permit the property to be taken under a tax warrant. But the same principle is applied here as in all other cases where attempts are made to reach the property by independent process.⁵¹ In a leading case where this point was considered the supreme court said: "The levy of a tax warrant, like the levy of an ordinary *fiery facias*, sequesters the property to answer the exigency of the writ; but property in the possession of the receiver is already in sequestration, already held in equitable execution, and while the lien for taxes must be recognized and enforced, the orderly administration of justice requires this to be done by and under the sanction of the court. It is the duty of the court to see to it that this is done; and a seizure of the property against its will can only be predicated upon the assumption that the court will fail in the discharge of its duty, an assumption carrying a contempt upon its face."⁵²

§ 2604. Power of Trustee to Deal with Receivership Property.

The following case, decided only a few years ago, affords an interesting illustration of the operation of the principle that when property comes in the hands of a court by the appointment of a receiver, it can be reached and dealt with only through the court appointing the receiver.

Hitz v. Jenks (1902) 185 U. S. 155, 46 L. ed. 851: A deed of trust on real property with a power of sale in the trustee had been executed to secure the payment of notes. Litigation ensued between parties claiming interests in the property, and

day (1886) 12 Sawy. 214, 216, 29 Fed. La Bee (1897) 83 Fed. 761; Burleigh v. 233, 234; Malcomson v. Wappoo Mills Chehalis County (1896) 75 Fed. 873; (1898) 85 Fed. 910. Johnson v. Southern etc. Assoc. (1904)

The only effect of the service of an attachment on property in the hands of a receiver is merely to notify the court, through its receiver, of the existence of the claim. *In re John L. Nelson & Bro.* 132 Fed. 540; King v. Wooten (1893) 4 C. C. A. 519, 54 Fed. 612; Clark v. McGhee (1898) 81 C. C. A. 321, 87 Fed. 789.

In re Tyler (1893) 149 U. S. 164, 183, 37 L. ed. 689, 695. See also *Georgia*

⁵¹ *Oakes v. Myers* (1895) 68 Fed. 807; *v. Atlantic etc. R. Co.* (1879) 3 Woods *Ex parte Chamberlain* (1893) 55 Fed. 434 (levy of tax warrant on property 704; *Ex parte Huidekoper* (1893) 55 Fed. 709; *Virginia etc. Co. v. Bristol* application for leave to proceed under Land Co. (1898) 88 Fed. 134; *Ledoux v.* the levy denied).

the trustee named in the deed was appointed receiver *pendente lite*, to manage the property and collect its rents and profits. It was held that a sale of the property made by him in his capacity as trustee while he was also receiver of the same property was ineffectual to convey a title. The fact that he was not under a prohibitive injunction not to sell was immaterial. The fact that the property was in the hands of a receiver was itself an inhibition against the sale.

Disposition of Prior Liens.

§ 2605. Conduct of Receivership Proceedings with Reference to Adverse Liens and Claims.

The circumstance that persons having an interest in or lien upon property in the hands of a receiver are effectually precluded from enforcing such right in any other court than that in which the receivership proceedings are pending imposes on that court the equitable obligation so to conduct the receivership proceedings that all persons having any just claim upon the property may be afforded ample means of asserting the same in that suit. In conformity with this idea, courts of equity in conducting receiverships exercise great care to preserve all prior liens and incumbrances unimpaired. To this end a court of equity will adopt proper methods, by reference to a master or otherwise, to ascertain such parties and bring them before the court;⁵³ and the rights of persons having superior claims by prior mortgage or otherwise to the property will not be interfered with.⁵⁴

Furthermore, it is a rule that all persons having prior liens and incumbrances must have notice and an opportunity to come in and claim their prior right to the property or interest in the fund. If such notice and opportunity be not given, such prior liens are not in any way affected by the proceedings in that suit,⁵⁵ and they may be duly enforced in a subsequent proceeding instituted after the first court has let the property go.

The usual and proper proceeding by which a person having a lien upon property in the hands of a receiver or claiming other interest

⁵³ *In re* Hall & Stillson Co. (1895) 69 Fed. 425; *Fidelity Insurance etc. Co. v. Roanoke Iron Co.* (1896) 81 Fed. 439; *Vance v. Royal Clay Mfg. Co.* (1897) 82 Fed. 251; *Moore v. Southern States etc. Co.* (1896) 83 Fed. 399; *McRae v. Bowers Dredging Co.* (1898) 86 Fed. 344; *Central Trust Co. v. Worcester Cycle Co.* (1902) 114 Fed. 659, 665. See *Cohen v. Gold Creek etc. Co.* (1899) 95 Fed. 590.

Eq. Prac. Vol. II.—95.

⁵⁴ *Risk v. Kansas Trust & Banking Co.* (1893) 58 Fed. 45.

As to the effect, under a local statute, of the appointment of a receiver upon attachment and execution liens, see *Central Trust Co. v. Worcester Cycle Mfg. Co.* (1902) 114 Fed. 650.

⁵⁵ *Wiswall v. Sampson* (1852) 14 How. 67, 14 L. ed. 328.

in it may assert the same is the intervention *pro interesse suo*, where the claimant or lienholder is not already a party to the suit. The nature of this proceeding has been elsewhere described.⁵⁶

§ 2606. Court's Control over Liens Claimed by Outsiders.

In dealing with liens on property in the hands of a receiver and other interests in the same asserted by any person, the court has plenary power to control, manage, and dispose of such liens and interests in such way as, while protecting the claimant or lienholder, will enable the court to realize most out of the property for the benefit of all interested. The court may, for instance, require a lienholder to execute a release of his lien in order that the property may be sold free from the incumbrance, the lien being at the same time expressly transferred by the court from the property so released to the proceeds to be realized from the sale.⁵⁷

§ 2607. Practice as to Satisfaction of Prior Liens.

Whether a court appointing a receiver should undertake to adjudicate all liens on the property and provide for their satisfaction depends on the circumstances of the case. The plain duty of the court in this matter is to preserve the essential rights of the parties. If it appears that the receivership can be conducted to a conclusion and the receiver discharged without prejudice to any liens that may exist on the property, the court in such case may, if it prefers, pass over the matter of the liens and leave the parties to work out their rights in some other proceeding as they may be advised; but if there is danger that the lienors may lose their rights unless they are protected in some order made by the court, such order should be made; or some other course should be followed which the circumstances suggest as suited to the particular exigency.⁵⁸

§ 2608. When Lienor Permitted to Enforce Lien Directly.

Though undoubtedly a court of equity may, upon proper application, permit a creditor having a superior lien to proceed directly to the enforcement of his lien, such proceedings on behalf of the prior incumbrancer should always be under the control of the court. Thus if the property in dispute is ample and the litigation promises to be

⁵⁶ See *ante*, §§ 1364-1388.

⁵⁷ *De Visser v. Blackstone* (1868) 6 Blatchf. 235, Fed. Cas. No. 3,840.

⁵⁸ *Commonwealth Roofing Co. v. North American Trust Co.* (C. C. A.; 1905) 63 C. C. A. 418, 135 Fed. 984.

protracted, a prior judgment creditor might be permitted to have execution issued, and then the court could require the party prosecuting the receivership proceedings to pay off the claim. But any actual sale under the execution would apparently not be permitted in any case.⁵⁹

A party who desires to get permission of a federal court to levy an execution from another court on property in the hands of its receiver should give notice of his motion or petition not only to the receiver but to all parties in interest, as for instance, to a claimant of the property who is a party to the original suit.⁶⁰

§ 2609. Enforcing Mechanic's Lien on Receivership Property.

One who has a mechanic's lien on property going into the hands of a receiver need not go to the trouble of actually attaching for the purpose of enforcing his lien. In order to effectuate the lien by attachment he would first have to go into court and ask for leave to proceed in that way; and the better procedure is for him to intervene at once by petition and ask the court to adjudicate the lien and charge the property with it. This the court has abundant authority to do, without resorting to any process of attachment. The appointment of the receiver fixes the rights of all the parties and gives the court full power to determine the true interests of all concerned.⁶¹

§ 2610. Order for Surrender of Property to Claimant.

Where a stranger intervenes and makes a sufficient showing of title in himself, the court will usually order the receiver to surrender the property to the claimant. An interlocutory order directing the receiver to turn over property to a particular person does not constitute a binding adjudication of title or a final determination of the right to possession.⁶²

The speedy surrender of property held by a receiver to those who may appear to be entitled to its control and custody is always desirable, and the courts are usually anxious to be relieved of the responsibility incident to the continuance of the receivership. Accordingly it is not unusual for the court to order the receiver to surrender the property before the final settlement, the party receiving the property

⁵⁹ *Hitz v. Jenks* (1902) 185 U. S. 166, 46 L. ed. 855; *Wiswall v. Sampson* (1852) 14 How. 68, 14 L. ed. 329.

⁶⁰ *In re Hall & Stilson Co.* (1895) 69 Fed. 425.

⁶¹ *Commonwealth Roofing Co. v. North American Trust Co.* (C. C. A.; 1905) 68 C. C. A. 418, 135 Fed. 984.

⁶² *Marshall v. Otto* (1893) 59 Fed. 249.

giving sufficient security to abide by any decree that may be entered against the estate. The authority of the receiver in respect to defending against claims made to the property is usually in such case continued, notwithstanding the surrender of the property.⁶³

§ 2611. Formalities Incident to Compliance with Such Order.

If a court orders that property in the hands of a receiver shall be turned over to a particular individual upon demand made by him of the receiver, such person should accompany his demand by presenting a certified copy of the order and should signify his willingness to execute a receipt for the property. The copy of the order and the receipt are then filed by the receiver with the papers and constitute a voucher showing the performance of the order.⁶⁴

§ 2612. Reimbursement of Fund or Property Appropriated by Receiver.

An individual whose money or property has been wrongfully appropriated by a receiver and applied to the purposes of the trust may be reimbursed out of any funds belonging to the trust and remaining in the receiver's hands. The circumstance that a distribution of the particular money has been made does not destroy the equitable right of such person to charge the whole fund,⁶⁵ provided the circumstances are such as to make out, upon general equitable principles, a case for following such money into the trust fund.⁶⁶

⁶³ *Bosworth v. St. Louis Terminal etc. C. A.*; 1896) 74 Fed. 395, 20 C. C. A. Asso. (1899) 174 U. S. 189, 43 L. ed. 943. 468, 33 L.R.A. 739.

⁶⁴ *Very v. Watkins* (1859) 23 How. 469, 16 L. ed. 522.

⁶⁵ *Terre Haute etc. Co. v. Cox* (C. C. A.; 1900) 102 Fed. 825, 42 C. C. A. 654.

⁶⁶ *Standard Oil Co. v. Hawkins* (C.

CHAPTER LXIII.

RECEIVERS (*continued*).

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*Court's Control over Receiver.***§ 2613. To What Court Receiver Responsible.**

As the receiver is directly responsible to the court of appointment, he is accountable in such manner, or to such persons, as the court may direct; but he is not responsible as receiver to any other court than that from which he derives his authority.¹ However, a receiver appointed by a state court may be held accountable by a federal court when the cause is removed to the latter court from the state court.²

§ 2614. Supervisory Authority of Court.

As officer and agent of the court by which he was appointed, the receiver is at all times subject to its control. Deriving his existence from the court whose creature he is, the receiver is subject at every step to the supervision of that court in all matters pertaining to the management of the property or funds placed in his charge.³ If a receiver proposes to remove the property or the fund that he is administering from the jurisdiction, the court may restrain him from so doing until an adjudication is had on the merits of a claim of ownership or lien asserted by an intervening petitioner.⁴

¹ Conkling v. Butler (1865) 4 Biss. Kansas Pac. R. Co. (1878) 5 Dill. 479; 22; Bill v. New Albany R. Co. (1870) 2 Green v. Hanberry (1830) 2 Brock. 419. Biss. 390.

² Hinckley v. Gilman etc. R. Co. (1879) 100 U. S. 153, 25 L. ed. 591. *Court May Compel Discontinuance of Nuisance* by its receiver. Felton v. Ackerman (C. C. A.; 1894) 61 Fed. 225.

³ Booth v. Clark (1854) 17 How. 331. 9 C. C. A. 457.
⁴ American Can Co. v. Williams (1907) 15 L. ed. 167; Davis v. Gray (1872) 16 Wall. 218, 21 L. ed. 452; Chambers v. McDougal (1890) 42 Fed. 694; Meier v. Fed. 200, 79 C. C. A. 158.

§ 2615. Order of General Instructions—Application for Specific Directions.

General instructions as to the manner in which the receiver shall proceed in performing his official duties are commonly inserted in the order appointing him; and he is also entitled to the advice of the court in particular exigencies that arise in the course of the administration of the trust. The receiver should take care to apply for particular instruction upon all important matters not covered by the order of appointment. The receiver is not to manage the property committed to his charge as if it were his private property. It is his duty to administer the receivership as a trust, under the authority and guidance of the court. If the receiver incurs unadvised and unnecessary obligations, it is at his own risk.⁵

The court exercises control over its receiver by means of orders entered in the particular case and not through orders spread generally on the minutes.⁶

§ 2616. Who May Obtain Order for Guidance of Receiver.

Orders for the control of a receiver may be obtained not only upon his own application, but upon the application of any party to the cause, or even of persons who are not parties, provided they are in a position to be injured or affected by the course that the receiver may adopt.⁷

§ 2617. Informal Instructions—When Formal Motion Proper.

The matters about which a receiver may find occasion to seek the instructions of the court are of great variety and vary from questions of small detail to questions of great moment. In small matters the advice of the judge may be informally sought on *ex parte* application in open court or even at chambers; but where adverse rights are concerned or the matter is one of much moment, it is desirable that notice should be given to any parties interested in the right disposition of the matter. In regard to the conclusiveness and value of the advice and suggestions of the court, it has been observed that if there are

⁵ *Braman v. Farmers' Loan & Trust Co.* (C. C. A.; 1902) 114 Fed. 18, 51 C. Louis etc. R. Co. (1894) 59 Fed. 514 C. A. 644 (holding that the renting of an office without the sanction of a previous order from the court was improper.)

⁶ *In re Hall v. Stilson* (1895) 69 Fed. 425, 427.

⁷ *Continental Trust Co. v. Toledo, St. Louis etc. R. Co.* (1894) 59 Fed. 514 C. A. 644 (where employees of a receiver applied to the court for an order to prevent the receiver from reducing wages.)

parties in adverse interest, and they have their day in court, the advice of the court may be decisive; but if the application is *ex parte*, the advice is binding only on the receiver, as the judge may afterwards change his mind on hearing full argument.⁸

§ 2618. Discretion of Receiver in Carrying out General Instructions.

Though the receiver is at all times subject to the orders and directions of the court of his appointment, yet the instructions given to him are frequently of a general character, and the *minutiae* of his business are confided in a large degree to his discretion. Receivers are usually appointed because of their fitness for the particular trust reposed in them, and consequently the court does not readily undertake to control the receiver as to the matters properly confided to his discretion. This is particularly true of receiverships involving the management of large and complicated enterprises.⁹ If the court appointing a receiver were to undertake to meddle in everything and to determine every matter that might arise, the conduct of receiverships would become cumbersome and expensive indeed. The propriety of a court's refusal to interfere as to details in the receiver's management of his trust is much stronger, of course, where any investigation of that matter by the court would be tedious or otherwise impracticable.

§ 2619. Petition of Employees in Respect to Relations with Receiver.

The practice by which the employees of receivers are permitted to apply to the court for relief from any substantial grievance suffered by them at his hands under the authority of the court or independent of such authority is well established, especially in connection with railroad receiverships.¹⁰ When such an application is made by or on behalf of the employees, it becomes the duty of the court to consider the same; and if the allegations are of a character to make it proper to consider them further, the receiver should be required to file an answer. The court will then be able to determine from the applica-

⁸ *Missouri Pac. R. Co. v. Texas etc. R. Co.* (1887) 31 Fed. 862. note; *Continental Trust Co. v. Toledo, St. L. etc. R. Co.* (1894) 59 Fed. 514.

⁹ *Continental Trust Co. v. Toledo etc. R. Co.* (1894) 59 Fed. 514, 518. In *Booth v. Brown* (1894) 62 Fed. 794, the court entertained but did not grant

¹⁰ *Frank v. Railway Co.* (1885) 23 Fed. 757; *In re Doolittle* (1885) 23 Fed. 544, 548; *Waterhouse v. Comer* (1893) 55 Fed. 149, 19 L.R.A. 403; *Farmers' Loan etc. Co. v. Northern Pac. R. Co.* (1894) 60 Fed. 803, 818, 25 L.R.A. 414, a petition presented in behalf of employees, who had quit the employment of the receiver on the occasion of a strike and wished to be reinstated in their jobs.

tion and answer whether the issue between the receiver and his employees is of such character as to require a formal investigation, either by reference to a master or by hearing witnesses in open court.¹¹

§ 2620. Formal Pleadings Unnecessary in Such Proceeding.

The strict rules of equity pleading are not insisted upon in these proceedings. In a case where a petition on behalf of employees against the receiver appeared not to be prosecuted by any proper person in interest, the court, instead of dismissing the petition peremptorily, allowed others to come in who were entitled to present the application. Indeed the court may, of its own authority and because of the peculiar relation of trust existing between it and the receiver and between it and the employees of the receiver, consider an application or petition preferred on behalf of the employees, though it is informally presented and is not prosecuted by a proper person. But of course the court will not ordinarily undertake to investigate the conduct of its receiver and to admonish or restrain him at the instance of any litigious busybody. It would be mischievous indeed if a receiver were required to answer with respect to his official acts at the suit of a mere meddler.¹²

§ 2621. Review of Receiver's Discretion as to Scale of Wages.

In a number of instances the courts have been called upon to pass on disputes between receivers and employees in regard to the terms of their employment or the wages to be paid. These are matters that are primarily committed to the discretion of the receiver; and the courts are inclined to overrule him only in a clear case of a mistaken use of his power.¹³ His decision is ordinarily treated as final, unless palpable wrong and injustice is being done. But notwithstanding the courts have sometimes laid great weight on the fact that the receiver's discretion in adjusting his relations with his employees is subject to review only in case of an abuse in that discretion, it must be considered that after all the matter is properly one for the court to pass on; and if the court considers the reduction reasonable, and it appears to be necessary, the receiver will be authorized to take such action, but if it does not appear to be necessary or reasonable, the court will not allow the scale of wages to be reduced. The mere circumstance that

¹¹ *Continental Trust Co. v. Toledo etc. R. Co.* (1894) 59 Fed. 514. ¹³ *Booth v. Brown* (1894) 62 Fed. 794.

¹² *Platt v. Philadelphia etc. R. Co.* (1894) 65 Fed. 872.

sufficient help can be had at lower rates than the prevailing scale does not alone justify a reduction in wages. The retention of faithful, intelligent, and capable employees is greatly more important than the item of economy.¹⁴

A receiver will not be permitted to renounce the schedule of wages agreed upon between the corporation and its employees and to fix a new and lower scale, at the same time retaining the employees and asking the court to direct them to conform to such scale. The receiver cannot at the same time claim the benefit of a contract and renounce its burden. To insist upon performance by the other party impliedly operates as an adoption of the contract. If the receiver wishes to escape from the obligation he must indicate a willingness to absolve the other party from his part.¹⁵

1. *Thomas v. Cincinnati etc. R. Co.* (1894) 62 Fed. 17: In refusing, upon a petition of the employees, to set aside an order of receiver making a ten per cent. cut in wages, the court directed attention to the attitude taken by it on such questions in the following words: "The court cannot and does not undertake to operate a railroad itself. It appoints, as its agent to do so, a man of well-known professional skill and experience as a railroad manager. In his judgment, the court must necessarily repose a confidence, commensurate with the large interests intrusted to his care. Hearings of this kind may be had, and, if the receiver has made a manifest error or committed an abuse of the discretion intrusted to him, the court will correct it. But the burden of showing either must, in the nature of things, be upon the petitioner."

2. *Ames v. Union Pac. R. Co.* (1894) 60 Fed. 674, 62 Fed. 7: Where the receiver before promulgating a revision and rearrangement of the rules, schedules, and wages of his nonsalaried employees asked the court to sustain him and also prayed that the employees be directed to refrain from conspiring with intent to induce a strike, the court came to the conclusion, upon the showing made to it, that it was to the interest of all concerned for the same scale of wages to prevail as before the receivership proceedings were instituted and that the same regulations should be likewise continued without change. Accordingly the contemplated changes were not sanctioned, though the receiver stated that the employees were receiving higher wages than were paid on other railroads in that region. In refusing to adopt the schedule of wages proposed by the receiver the court observed: "When the schedule of wages in force at the time the court assumes the management of the road is the result of a mutual agreement between the company and the employees, which has been in force for years, the court will presume the schedule is reasonable and just, and any one disputing that presumption will be required to overthrow it by satisfactory proof."¹⁶

¹⁴ *United States Trust Co. v. Omaha etc. R. Co.* (1894) 63 Fed. 737.

¹⁶ *Ames v. Union Pac. R. Co.* (1894) 62 Fed. 12.

¹⁵ *Ames v. Union Pac. R. Co.* (1894) 62 Fed. 7, 13.

§ 2622. Receiver Required to Give Notice of Cut in Wages.

As the re-adjustment of the scale of wages of the employees of a railroad receiver involves a grave responsibility, it has been considered reasonable to require a receiver who contemplates a reduction of wages to give due notice of the proposed change, so that the employees may have a chance to be heard. If, after conferring together, the receiver and the employees are not able to agree upon the proper step to be taken, the matter should then be referred to the court.¹⁷

§ 2623. Discretion of Receiver as to Continuation of Prior Regulations.

A receiver may be upheld in continuing a regulation long enforced by the company prior to the receivership, which regulation has worked well, though the court might consider such regulation to be of such doubtful policy as not to justify putting it into effect if it had not previously been in force. The question whether the receiver should continue a prior regulation is different from the question whether it should be adopted as a new rule.¹⁸

§ 2624. Relations of Receiver and Employees Generally—Gratuitous Assistance to Employee.

In his relations to his employees the receiver should adopt a just and liberal policy such as is adopted by well-managed concerns in private hands. In exceptional cases gratuitous assistance can be given to a faithful employee, but this should, of course, be done only under the protection of an order of the court. The receiver, it has been said, should be required to act towards his employees as would other persons of ordinary humanity and right feeling under similar circumstances.

Freundlich's Case (1886), noted in *Missouri etc. R. Co. v. Bradford* (1888) 33 Fed. 701: One Freundlich, an employee of a railroad receiver, was accidentally hurt while in the discharge of his duty, without contributory negligence on his part but under such circumstances that the receiver was not liable. The court directed the receiver to pay him his wages during the time he was disabled from

¹⁷ *Ames v. Union Pac. R. Co.* (1894) 60 Fed. 674 (1894) 62 Fed. 7; *United States Trust Co. v. Omaha etc. R. Co.* (1894) 63 Fed. 737. (But in the particular case where this rule was first announced it appeared that under agreements in force at the time the receiver was appointed, no revision of the scale of wages could be made except upon notice and a conference between the officers of the road and its employees.)
¹⁸ *Platt v. Philadelphia etc. R. Co.* (1894) 65 Fed. 665.

work, observing that it was not only equity and good conscience but good railway management that in such cases wages should not be stopped during convalescence.

The principle here enunciated has been approved by other judges in several instances. It will, however, be applied only where the servant has not shown himself negligent or unfaithful.¹⁹

Authority of Receiver.

§ 2625. Court as Source of Receiver's Authority.

In regard to the extent of the authority of a receiver it may be said generally that he has such power as is conferred upon him expressly or by necessary implication and none other. In what are called statutory receiverships, the power and the authority of the receiver is defined to a greater or less extent by the terms of the statute under which the receivership is created; but in all ordinary receiverships instituted by the court of equity in conformity with its usual practice, the authority of the receiver is derived exclusively from the court, and the receiver has only such powers as the court deems proper to confer on him.²⁰

§ 2626. Assumption of Personal Liability by Receiver.

The receiver can of course always make himself personally liable on contracts made by him in the management of the receivership. Whether he does in a particular case assume personal responsibility is to be determined upon the facts.²¹

§ 2627. Order Defining Extent of Receiver's Powers.

It is customary in the order of appointment to define the duties and powers of the receiver quite fully. Such order supplies the chart by which the receiver is to be guided, and the limits of the powers therein granted must not be exceeded by him. Of course it is not necessary that every little thing that the receiver is to be allowed to

¹⁹ *Missouri Pac. R. Co. v. Texas etc. R. Co.* (1890) 41 Fed. 319; *Thomas v. East Tenn. etc. R. Co.* (1894) 60 Fed. 7.

²⁰ *Quincy etc. R. Co. v. Humphreys* (1892) 145 U. S. 82, 36 L. ed. 632; *Union Bank v. Kansas City Bank* (1890) 136 U. S. 223, 34 L. ed. 341; *Thompson v. Phenix Ins. Co.* (1890) 136 U. S. 287, 34 L. ed. 408; *Booth v. Clark* (1854) 17 How. 322, 15 L. ed. 164.

The receiver of a railroad on which

the state has a lien, appointed by the governor in conformity with a statute, may, under such statute, exercise a power and authority somewhat greater than that which it would be permissible for an ordinary receiver appointed by a court of equity to exercise. *Lafayette Co. v. Neely* (1884) 21 Fed. 738.

²¹ *Cake v. Mohun* (1896) 164 U. S. 311, 41 L. ed. 447.

do should be expressly enumerated; but it is necessary that authority for any particular course should be found in the order of appointment, or should be deducible from it by necessary implication. And where an unusual or extraordinary power is claimed for the receiver, the existence of it should be clearly made out either from the order of appointment or some subsequent order of the court. It has been observed that the progress of the law in regard to receivers has been uniformly marked by the conferring of larger powers on them.²²

§ 2628. Division of Authority between Co-receivers.

If two or more receivers of a railroad are appointed who reside at considerable distances from one another, and by an arrangement among themselves one is constituted a managing receiver, his authority will have a broader scope than it otherwise would have, approximating somewhat to that of a sole receiver. And in all local matters of minor importance one of the receivers so situated will be allowed to bind the receivership where any occasion arises which requires his attention. The absence and inaccessibility of the other receivers creates an agency of necessity.²³

§ 2629. Incidental and Implied Powers of Receivers.

A receiver has, by implication, authority to take any steps or do any act necessary to accomplish the end or purpose that he is directed to accomplish. Receivers necessarily have a considerable amount of discretionary power in the management and control of property intrusted to their care. The extent of the implied powers of the receiver and the extent of his discretion depend largely upon the nature of the receivership. It is obvious that the duties and powers of a managing receiver must be very much larger and more extensive than those of a receiver who is merely appointed to receive and hold assets. Where a receiver is appointed to manage and conduct a business, many of its details must of necessity be left to his judgment, for it would be impracticable to apply to the court for specific instructions in every instance.²⁴

²² *Davis v. Gray* (1872) 16 Wall. 219, equity. *The Clara A. McIntyre* (1899) 21 L. ed. 452. 94 Fed. 552.

Apparently a receiver has no authority to execute an assignment of a chose in action without an order of court to that effect. And a person who takes under his assignment, made without such

²³ *Girard Ins. Co. etc. v. Cooper* (1896) 162 U. S. 545, 40 L. ed. 1068.
²⁴ *Continental Trust Co. v. Toledo etc. R. Co.* (1894) 59 Fed. 514; *New York etc. R. Co. v. New York etc. Co.* (1893) 58 Fed. 268.

A receiver of a railroad who is directed to continue the operation of the road has the same power to make special contracts with particular individuals for the transportation of freight or passengers as the officers of the company ordinarily have. Indeed it would be in the highest degree disadvantageous to all interested, if this were not so.²⁵ A receiver who is given authority to manage and carry on a private business enterprise has implied authority to incur obligations for supplies and materials.²⁶

§ 2630. Authority of Receiver to Employ Help and Appoint Agents.

A receiver charged with duties that it is impracticable for him to do in person has implied authority to employ help.²⁷ The receiver of a railroad who is directed to conduct and continue the business of the company has the same power to appoint agents, general or special, that the official head of the corporation had before the receiver was appointed.²⁸

Ratification by a receiver, or those competent to represent him, of a contract made on behalf of the receiver by an unauthorized agent is equivalent to a prior grant of authority.²⁹

§ 2631. Implied Authority to Employ Counsel.

A receiver has a right to employ counsel to advise him in the management of the property placed in his hands, and it is his duty to do so whenever legal advice or legal service is required.³⁰ Having authority to employ counsel in the first instance, he of course has authority to continue the employment of counsel in suits instituted prior to his appointment, where the prosecution of such suits looks to the protection of the trust property.³¹

§ 2632. Who May Be Employed as Legal Adviser.

Although the receiver is himself a lawyer, it may be proper for him to employ other legal counsel. In a case where this course was

²⁵ *Northern Pac. R. Co. v. American Trading Co.* (1904) 195 U. S. 461, 49 L. ed. 279; *affirming Farmers' Loan & Trust Co. v. Northern Pacific R. Co.* (1903) 120 Fed. 873, 57 C. C. A. 533.
²⁶ *Cake v. Mohun* (1896) 164 U. S. 311, 17 Sup. Ct. 100, 41 L. ed. 447.
²⁷ *Gunn v. Ewan* (C. C. A.; 1899) 93 Fed. 80, 35 C. C. A. 213.
²⁸ *Northern Pac. R. Co. v. American Trading Co.* (1904) 195 U. S. 462, 49 L. ed. 279.
²⁹ *Northern Pac. R. Co. v. American Trading Co.* (1904) 195 U. S. 462, 49 L. ed. 279.
³⁰ *Elk Fork Oil etc. Co. v. Foster* (C. C. A.; 1900) 99 Fed. 495, 39 C. C. A. 615; *Platt v. Archer* (1876) 13 Blatchf. 351; *Cowdrey v. Galveston etc. R. Co.* (1870) 1 Woods, 331.
³¹ *Sowles v. Nat. Union Bank* (1897) 82 Fed. 139.

sanctioned, the court approved the employment by the receiver of his own law partner.³² Ordinarily the attorney for the plaintiff in a bill under which a receiver is appointed should not be appointed attorney for the receiver.³³

§ 2633. Right of Receiver to Discharge Counsel.

A receiver may discharge counsel and substitute another in his stead. The court will not insist on the retention of counsel who is in disfavor with the receiver. But arrangement must be made to compensate the counsel who is discharged for such work as he has already done. If the business for which particular counsel was retained is practically finished, an order to discharge him and substitute another will not be allowed.³⁴

§ 2634. Receiver's Authority to Make New Executory Contract.

The receiver is not a general agent of the court such as would possess implied general authority to make executory contracts binding on the receivership. He has no authority to bind the trust by contract unless it is expressly conferred or the contract is approved and ratified by the court. This rule applies with peculiar force to contracts involving large expenditures and extending beyond the life of the receivership. Until such unauthorized contracts are confirmed and ratified, the court is at liberty to deal with them as to it may appear just. It may modify them or set them aside entirely. It follows that all persons dealing with receivers do so at their peril, and they are bound to take notice of the incapacity of the receiver to conclude a binding contract without the sanction of the court. Though a receiver may enter into negotiations and make agreements that would be fully binding on him if he were acting in an individual capacity, yet before the funds in his hands can be affected, the court must give its consent and sanction.³⁵

1. *Chicago Deposit Vault Co. v. McNulta* (1894) 153 U. S. 554, 38 L. ed. 819, 14 Sup. Ct. 915: The order appointing a railroad receiver authorized him, subject to

³² *Gunn v. Ewan* (C. C. A.; 1899) 93 Fed. 80, 35 C. C. A. 213.

In one instance the court refused to sanction the appointment of a particular lawyer as attorney and counsel for a receiver where it appeared that such attorney was a kinsman of the receiver and was a member of the bar of a different state, having been imported, so

to speak, by the receiver to act as his counsel. *Blair v. St. Louis etc. R. Co.* (1884) 20 Fed. 348.

³³ *Blair v. St. Louis etc. R. Co.* (1884) 20 Fed. 348.

³⁴ *In re Herman* (1892) 50 Fed. 517.

³⁵ *Smith v. McCullough* (1881) 104 U. S. 25, 26 L. ed. 637.

the supervision of the court, to make all contracts that might be necessary in carrying on the business of the road. For the purpose of conducting the receivership business, the receiver found it necessary to have a suite of rooms, and to that end leased such rooms for a period of more than four years, at an annual rental of about ten thousand dollars. The contract of lease was not reported to or confirmed by the court, but in the receiver's reports the items of monthly rent for these offices were entered, under the heading of "operating expenses," as "rent of general offices." The receivership was terminated before the lease expired, and the receiver then surrendered the offices and gave notice that he would not be bound by the lease. However, the rent was paid for all the time the rooms were actually occupied. The lessor insisted that the receiver was bound by the contract. But it was held to the contrary. The order of the court appointing the receiver was not broad enough to authorize the lease, and the act of the court in allowing the monthly items of rent was not a confirmation of the contract, of the existence of which, indeed, the court was ignorant.

In discussing the authority of a receiver to make contracts involving large outlays and extending beyond the life of the receivership, the supreme court said: "It is undoubtedly true that a receiver, without the previous sanction of the court, manifested by special orders, may incur ordinary expenses or liabilities for supplies, material, or labor needed in the daily administration of railroad property committed to his care as an officer of the court; but it seems equally well settled that the courts decline to sanction the exercise of this discretion on the part of receivers in respect to large outlays or contracts extending beyond the receivership, and intended to be binding upon the trust. The receiver being an officer of the court, and acting under the court's direction and instructions, his powers are derived from and defined by the court under which he acts. He is not such a general agent as to have any implied power, and his authority to make expenditures and incur liabilities—like the one in question—must be either found in the order of his appointment, or be approved by the court, before they acquire validity, and have any binding force upon the trust." The court added, however, that where a contract entered into by a receiver has been completely performed and the claim is for compensation only, equitable relief may well be granted, though the contract was originally unauthorized and the court has never ratified it.

2. *Coudrey v. Galveston, Houston etc. Railroad*, (1876) 93 U. S. 352, 23 L. ed. 950: It was held that a receiver is not authorized, without the previous direction of the court, to incur any expenses on account of property in his hands, beyond what is absolutely essential to its preservation and use, as contemplated by his appointment. Accordingly, the expenditures of a receiver to defeat a proposed subsidy from a city, to aid in the construction of a railroad parallel with the one in his hands, were properly disallowed in the settlement of his final account, although such road, if constructed, might have diminished the future earnings of the road in his charge.

3. *Union Trust Co. v. Illinois Midland Co.* (1886) 117 U. S. 434, 479, 29 L. ed. 963, 978: Debts for considerable sums of money, borrowed by the receiver without previous authority from the court, were not allowed any priority out of the trust fund, though the moneys borrowed were applied to pay expenses of the receivership, such as supplies, repairs, and pay-rolls, and to replace moneys that had been so applied, for the reason that no order of the court had been obtained to borrow funds for those purposes.

§ 2635. Ratification by Court of Unauthorized Act of Receiver.

Though a receiver should, as a rule, take no step in the conduct of his trust without the general or special authority, express or implied, of the court of his appointment, yet where the receiver acts *bona fide* without such antecedent authority, and the act redounds to the benefit of the estate in his hands, it will usually be ratified and approved by the court. A decree confirming an act done by the receiver is equivalent to previous authority and direction.⁸⁶

§ 2636. Want of Authority in Receiver Not Available to Other Party.

Want of antecedent authority in the receiver to transfer property or make a contract does not necessarily so far invalidate the transaction as to enable the other party to set up the want of authority, especially where the act or transaction is such that the court might properly have authorized it in the first instance; and such a transaction is always made good by the subsequent approval of the court.⁸⁷

Thompson v. Phenix Ins. Co. (1890) 136 U. S. 287, 34 L. ed. 408: One Kearney, as receiver of a hotel, took out insurance on it. The insurance company knew that he had no personal interest in the property and acted entirely in a representative capacity. As a defense to the policy, the company set up that the receiver had not been authorized to take out such insurance. This contention was overruled, the court saying: "Whether Kearney exceeded his authority, or rightly applied the funds in his hands, are questions in which no one is concerned, except himself, the court to which he was amenable, and the parties interested in the property in his charge. If he was not, technically, authorized to use the funds in his hands to pay for insurance, still, upon the settlement of his accounts, if he acted in good faith, the court might allow him any sums paid out for that purpose. He held such relations to, and was under such personal responsibility for the safety of the property, that he could make a valid contract of insurance, although his use of the funds in his hands for that purpose was subject to the approval of the court."

§ 2637. Lease Executed by Authority of Court—Compensation to Lessee for Breach.

If a receiver, acting under the authority of the court, demises property held by him as receiver, the lease is valid to the same extent as any other contract made between private persons;⁸⁸ and if the

⁸⁶ *Richards v. Halliday* (C. C. A.; (C. C. A.; 1902) 114 Fed. 14, 51 C. C. A. 1901) 112 Fed. 86, 50 C. C. A. 133. 640. See *Vault Co. v. McNulta* (1894)

⁸⁷ *Manufacturing Co. v. Bradley* 153 U. S. 554, 560, 14 Sup. Ct. 915, 38 (1881) 105 U. S. 175, 28 L. ed. 1034. L. ed. 819, 821. The consent of the mort-

⁸⁸ *Farmers' Loan & Trust Co. v. Eaton* gage bondholders is not essential to the Eq. Prac. Vol. II.—96.

receiver sees fit to violate the lease or the court finds it necessary to authorize a breach of its terms, as by turning the lessee out, the lessee is entitled to damages, and the court will assess the proper damages in the receivership proceeding. In a case where it was insisted that the lessee was not entitled to damages where the lease was terminated without the consent of the lessee, it was said that courts ought to be even more scrupulous in keeping their engagements or in awarding damages for injury done by them or by their agent than in enforcing the engagements of others.³⁹ A judicial tribunal, as has been observed by Judge Brewer, should be chary of its promises but eager of performance.⁴⁰

Where the court authorizes a receiver appointed in a foreclosure proceeding, to lease the property held by him, the lease made in pursuance of such order is binding on the mortgagee though he is not a formal party to the suit.⁴¹

§ 2638. Form of Order Authorizing Lease.

Where the court authorizes a lease of receivership property to be made, the order directing such step should expressly reserve an authority to terminate the lease; and the same provision should be inserted in the lease itself. If this is not done, and the property is leased for a fixed term, the lessee, upon being ousted by an order of the court before the termination of the lease, is entitled to damages for the breach of the contract.⁴²

Disposition of Existing Contracts.

§ 2639. Receiver Not Bound by Prior Executory Contract.

In the conduct of receivership causes important questions not infrequently arise in regard to the duty of the receiver with respect to the performance of contracts entered into before his appointment by the person or corporation over whose property the receivership extends. Superficially it might appear that the receiver should be held bound by the executory contracts of the person whose property

making of a valid lease by the receiver ton etc. R. Co. (1887) 32 Fed. 805.
of a railroad. Mercantile Trust Co. v. 808.

Missouri etc. R. Co. (1889) 41 Fed. 8, 11.

³⁹ Farmers' Loan & Trust Co. v. Eaton

(C. C. A.; 1902) 114 Fed. 14, 16, 51 C.
C. A. 640.

⁴⁰ Farmers' Loan etc. Co. v. Burling-

⁴¹ Western Union Tel. Co. v. Boston

Safe Deposit Co. (1901) 112 Fed. 38.

⁴² Farmers' Loan etc. Co. v. Eaton
(C. C. A.; 1902) 114 Fed. 14, 17, 51 C.

C. A. 640.

he has taken into custody, and that he ought to be held to the performance of all existing obligations. But it should be remembered that the receiver is not in privity with such person. He is not in the position of an assignee, but he is the representative of the court. It is obvious that when the court takes possession of an estate, the duty is imposed on it of administering the trust with an equal regard for the rights of all creditors interested in the distribution of the property. Furthermore, it is obvious that if the court were to recognize the binding force of all existing obligations and were to allow its receiver to proceed with specific performance of them, the chief end of the receivership would be defeated; for in the mere act of allowing one creditor to obtain all that he is entitled to, a preference would thereby be created in his favor. This the court will not allow. The general rule therefore in regard to executory contracts is that they are not binding on the receiver, unless the court directs him to proceed with the performance of them, or unless they are of such nature as to be capable of adoption by the receiver, and he does adopt them.⁴³

The rule that the receiver is not bound by the executory contract of the person over whose estate he is placed, is applicable even though such person is not actually insolvent and though the allegation of the bill to that effect should be found to be untrue.⁴⁴ Also whether the proceeding be one to foreclose a lien or merely to manage a trust that has been abused or mismanaged.⁴⁵

§ 2640. Consequences of This Doctrine.

The practical consequences of the doctrine by which the receiver is held not to be bound by contracts entered into by his insolvent predecessor is that, when such a contract is abrogated, the claim of the person with whom the contract was made is thereby reduced to a claim for damages for the breach of the contract, and it is thus put on the same plane as that occupied by the claims of other creditors.⁴⁶

⁴³ *General Electric Co. v. Whitney* (1896) 20 C. C. A. 674, 74 Fed. 664; (C. C. A.; 1896) 20 C. C. A. 674, 74 Fed. 664.

Central Trust Co. v. East Tennessee Land Co. (1897) 79 Fed. 19; *United Electric Securities Co. v. Louisiana Electric Light Co.* (1896) 71 Fed. 615; *Central Trust Co. v. Marietta etc. R. Co.* (1892) 16 L.R.A. 90, 51 Fed. 15. See *Keeler v. Atchison etc. R. Co.* (C. C. A.; 1899) 34 C. C. A. 523, 92 Fed. 545.

⁴⁴ *Empire Distilling Co. v. McNulta* (1897) 23 C. C. A. 415, 77 Fed. 700.

⁴⁵ *General Electric Co. v. Whitney* (1896) 20 C. C. A. 674, 74 Fed. 664.

⁴⁶ *Girard Life Ins. Co. v. Cooper* (1896) 162 U. S. 529, 40 L. ed. 1062, 16 Sup. Ct. 879, *affirming* (1892) 2 C. C. A. 245, 51 Fed. 332; *United Electric Securities Co. v. Louisiana Electric Light Co.* (1896) 71 Fed. 615.

Discretion of Court as to Adoption of Contract—Adoption by Receiver.

In determining whether to allow the performance of an executory contract, the court is controlled by the interests of all the parties concerned in the insolvent estate, and it will grant leave only when the estate in the hands of the receiver will be benefited. Where a contract creditor has a lien by virtue of which his contract is an incumbrance on the property, performance will be permitted in order to relieve the property. Where a receiver is clothed with such authority as would justify him in making a contract if it were not already in existence, he has the power to adopt a prior contract made by the person over whose estate he is made receiver; and this he may do without first obtaining leave of the court. Cases in which a receiver is entitled to adopt contracts by exercising his own right of election are commonly those where the receiver is charged with the duty of conducting or managing a continuing business. It is the duty of a receiver to refuse to adopt any executory contract that would prove so burdensome as to imperil the fund; on the other hand, he should use all reasonable efforts to carry out and perform any beneficial contract. Even when a contract has been adopted by the receiver, the court can step in and put an end to performance.⁴⁷ A receiver having power to elect whether he shall adopt a prior contract or not is entitled to a reasonable time within which to determine whether it will be to the best interest of the estate to adopt the contract.

1. *Sunflower Oil Co. v. Wilson* (1892) 142 U. S. 313, 35 L. ed. 1025: In a case where it was sought to hold a receiver liable on a conditional sale of rolling stock coupled with an unconditional undertaking by the railway to purchase, the supreme court said: "The receiver did not simply by virtue of his appointment become liable upon the covenants and agreements of the railway company. Upon taking possession of the property, he was entitled to a reasonable time to elect whether he would adopt this contract and make it his own, or whether he would insist upon the inability of the company to pay, and return the property in good order and condition, paying, of course, the stipulated rental for it so long as he used it. Of course, if he elects to take property subject to a condition, he is bound to perform the condition before he can obtain title to the property. He may, however, decline to assume this obligation, and return the property to the purchaser, upon complying with the terms of the contract with respect to such return."

2. *Central Trust Co. v. East Tennessee Land Co.* (1897) 79 Fed. 19: The petition in an intervention proceeding sought to compel a receiver to accept a conveyance under a contract for the sale of land and to pay the purchase price. Said

⁴⁷ *General Electric Co. v. Whitney* (C. C. A.; 1896) 74 Fed. 664, 20 C. C. A. 674.

Severens, District Judge: "This contract, when the receiver was appointed, was executory. The receiver was not bound to execute that contract, but might adopt it or not, as he should think for the best interests of the estate committed to his charge. Being in charge of an insolvent estate, he could elect whether he would execute the contract, or abide the damages resulting from its breach; and in exercising his discretion he may properly take into account the equities of the holders of other unperformed obligations of the East Tennessee Land Company. He has at no time signified his adoption of the contract; but on the contrary has resisted its enforcement. No doubt there would still be left to the vendor a claim in damages for the breach of the contract, if at the time when it went into insolvency and was transferred to the receiver a cause of action had arisen; but this would be a claim at large, and would not be accompanied by a vendor's lien. If the petitioner in this case was proceeding for relief of that kind, it ought probably to be allowed."

A receiver who with full knowledge fails to put an end to the performance of a contract made prior to his appointment and who encourages the other party to proceed with performance will be held to the payment of the contract price for such work as is done prior to his election to terminate the contract.⁴⁸

§ 2642. Petition for Order of Specific Performance.

As the courts do not recognize the binding force of pre-existing contracts, as against the receiver, it follows that the third person with whom such a contract has been made should not go ahead and perform his part of it after a receiver has been appointed, unless leave of the court has been obtained for him to finish the contract, or unless the circumstances are such that the receiver has the power to adopt the contract and he has done so. A contractor who continues performance of a contract for the building of a house after a receiver has been appointed and after the issuance of the usual injunction against existing executory contracts cannot acquire a mechanic's lien on the property that will be valid as against the mortgage debt. Nor is it material that the party so proceeding to perform claims to have been ignorant of the existence of the receivership. A party thus desiring to insist on the performance of a contract should always intervene by petition and ask leave of court to finish the contract.⁴⁹

§ 2643. Considerations Affecting Discretion of Court as to Granting Order for Specific Performance by Receiver.

In a proceeding to compel the receiver of a railroad specifically to perform a contract made by the officials of the road prior to the

⁴⁸ *Girard Life Insurance etc. Co. v. Cooper* (C. C. A.; 1892) 51 Fed. 332, 2 92 Fed. 760 C. C. A. 245. ⁴⁹ *Breed v. Glasgow Inv. Co.* (1899)

appointment of the receiver, the court will consider not only those features of the case that would ordinarily be operative on its judicial discretion in an ordinary suit for specific performance, but it will also consider the effect of granting the relief as respects rights acquired under the receivership proceedings; and specific performance will not be granted where it would result in putting a simple contract creditor in the virtual position of a lienholder.

Southern Express Co. v. Western N. Carolina etc. R. Co. (1878) 99 U. S. 191, 25 L. ed. 319: A railroad had, for a good consideration, made a contract with the plaintiff express company whereby it agreed to transport the plaintiff's express matter and to afford it other facilities for conducting its business. The bondholders brought a suit to foreclose their mortgage on the railroad, and a receiver was appointed. The receiver refused to carry out the contract with the express company, and the latter sought to enforce specific performance. This relief was refused on the ground that the plaintiff was a simple contract creditor and to enforce the contract would fix a charge on the property prejudicial to the lienholders.

§ 2644. Claim for Prior Breach of Contract or Tort—Prior Judgment.

Where there is an existing claim against the estate in the hands of a receiver, arising from prior breach of contract or from tort, the receiver of course has no authority to satisfy such obligation. The rule is the same even though such claim may have been reduced to judgment. Nor is the rule altered by the fact that the receiver may have made a promise to satisfy the claim. The court will not allow a preference to be created in this way.⁵⁰ An order of court to the effect that a receiver shall carry out and perform existing contracts must be understood to refer to existing executory obligations, and not to obligations arising from the prior breach of an unfinished contract; and such an order will not be construed to permit the payment of unsecured claims arising from the prior breach of contract.⁵¹

⁵⁰ *Whightsel v. Felton* (1899) 95 Fed. 923. A promise by a receiver to pay a pre-existing obligation for materials furnished to an insolvent road before the appointment of the receiver does not entitle the creditor to priority. *Denniston v. Chicago, Alton etc. R. Co.* (1864) 4 Biss. 414.

A claim against a railroad company arising prior to the appointment of a receiver was reduced to judgment. The

receiver afterwards agreed to satisfy the judgment. It was, however, held that it was not legally possible for the receiver to bind himself or his successor by such an undertaking and the claim was disallowed as a charge against the receivership. *Platt v. Philadelphia etc. R. Co.* (1902) 115 Fed. 842.

⁵¹ *Olyphant v. St. Louis etc. Co.* (1886) 28 Fed. 729.

*Disposition of Existing Leases.***§ 2645. Receiver Not Liable as Lessee of Prior Lease.**

In administering receivership affairs a question frequently arises as to the liability of the receiver for rents due on leases executed prior to the appointment of the receiver. The principle upon which the court here proceeds is that the receiver is not, by virtue of his appointment merely, bound by the existing contract of the person over whose estate he is appointed. He is not in the position of an assignee. He is simply a custodian for the court, and no change of title occurs when the appointment is made. His possession is not by act of the parties, for he holds under and for the court appointing him. Hence in the absence of some statute casting the title upon the receiver, or some actual assignment made by the lessee, the receiver does not become assignee of the term. Nor is there any privity of estate between the receiver and the lessor, as the appointment neither changes the title nor creates any lien on the property. The proposition that a receiver is not bound by a lease executed prior to his appointment does not imply that the lease is abrogated as between lessor and lessee, upon the appointment of a receiver, or that the receiver himself has a right to abrogate it as between lessor and lessee. All that is meant is that the lease is not in itself binding on the receiver and is not a charge upon the trust fund in his hands.⁵²

The chief results of the rule that a receiver is not bound by a prior lease are two, namely, (1) that the lessor is remitted to a claim for reasonable compensation (in determining which the contract rent is not conclusive), and (2) that in so far as the lessor is entitled to damages for the breach of the contract of lease, his claim is put on the plane of a simple contract debt and therefore is not entitled to priority.⁵³

§ 2646. How Receiver May Become Liable as Lessee.

Though the receiver is not legally bound by leases executed prior to his appointment, he may become liable to the lessor in more ways than one. He may take an actual assignment of the leasehold, or he may expressly ratify and adopt the contract, or he may impliedly make himself liable by excluding the lessor from the premises, or by using

⁵² *New York P. & O. R. Co. v. New York etc. R. Co.* (1893) 58 Fed. 268. (C. C. A.; 1896) 20 C. C. A. 232, 74 Fed. 88, 90.

⁵³ *Carswell v. Farmers' Loan etc. Co.*

them for the purposes of the receivership; or the court itself may order that he shall accept the lease and be bound by it.⁵⁴ Moreover the lessor has the right to insist that the receiver shall make his election within a reasonable time whether he will adopt the lease or surrender the premises.⁵⁵ If the receiver elects to adopt a lease, he becomes vested with the title to the leasehold interest, and a privity of estate is thereby created between the lessor and the receiver by which the latter becomes liable upon the covenant to pay rent.⁵⁶

1. *Empire Distilling Co. v. McNulta* (C. C. A.; 1897) 77 Fed. 700, 23 C. C. A. 415: "A receiver does not become liable upon the covenants of the lease because of his position as receiver, but because and only because of his own acts in respect thereto. He becomes liable when he has elected to assume the lease, or has taken possession of the demised premises, and continued in possession, under such circumstances as in the law would be equivalent to such an election."

2. *United States Trust Co. v. Wabash etc. R. Co.* (1893) 150 U. S. 287, 37 L. ed. 1085: The question was whether the receivers of the Wabash system took possession of subordinate leased lines under such circumstances as to charge them with the agreed rental so long as they retained possession of those lines. The general rule was stated to be that a receiver is not bound to adopt the contracts, accept the leases, or otherwise step into the position of the company, if in his opinion it would be unprofitable or undesirable to do so; and he is entitled, said the court, to a reasonable time to elect whether to adopt or repudiate such contracts.

3. *Dayton Hydraulic Co. v. Folsenthall* (C. C. A.; 1902) 116 Fed. 961, 54 C. C. A. 537: A receiver who had neither adopted the lease nor taken any actual possession of the leasehold was nevertheless required to compensate the lessor because the latter had been effectually excluded from taking possession of the premises. "By acts and conduct not involving an actual occupation of the premises, a receiver may come under an equitable obligation to a lessor for rents accruing during the receivership. A court of equity will not suffer an injustice to be done

⁵⁴ For illustrations of various aspects of this subject, and more especially as concerns the attitude of railroad receivers towards property leased by the road prior to the receivership, see the following cases: *St. Joseph etc. R. Co. v. Humphreys* (1892) 145 U. S. 105, 36 L. ed. 640, 12 Sup. Ct. 795; *Seney v. Wabash etc. R. Co.* (1893) 150 U. S. 310, 37 L. ed. 1092, 14 Sup. Ct. 94; *Central Trust Co. v. Marietta etc. R. Co.* (C. C. A.; 1891) 1 C. C. A. 140, 48 Fed. 875; *Savannah etc. R. Co. v. Jacksonville etc. R. Co.* (C. C. A.; 1897) 24 C. C. A. 439, 79 Fed. 35; *Mercantile Trust Co. v. Farmers' Loan etc. Co.* (C. C. A.; 1897) 26 C. C. A. 383, 81 Fed. 254; *Central Trust Co. v. Continental Trust Co.* (C. C. A.; 1898) 30 C. C. A. 235, 86 Fed. 517; *United States Trust Co. v. Mercantile Trust Co.* (C. C. A.; 1898) 31 C. C. A. 427, 88 Fed. 140; *Brown v. Toledo etc. R. Co.* (1888) 35 Fed. 444; *Central Trust Co. v. Wabash etc. R. Co.* (1893) 34 Fed. 359; *Park v. New York etc. R. Co.* (1893) 57 Fed. 799; *Ames v. Union Pacific R. Co.* (1894) 60 Fed. 998; *Grand Trunk R. Co. v. Central Vermont R. Co.* (1897) 81 Fed. 541; *Central R. etc. Co. v. Farmers' Loan etc. Co.* (1897) 79 Fed. 158; *Manhattan Trust Co. v. Sioux City etc. R. Co.* (1897) 81 Fed. 50.

⁵⁵ *Thomas v. Cincinnati etc. R. Co.* (1896) 77 Fed. 667.

⁵⁶ *United States Trust Co. v. Wabash etc. R. Co.* (1893) 150 U. S. 287, 37 L. ed. 1085.

a lessor by acts or conduct which amount equitably to an exclusion of the lessor from the premises, and an appropriation of them to the supposed benefit of the trust."

§ 2647. Right of Receiver to Take Possession of Leasehold.

It is well settled that the receiver is entitled to take possession of the leasehold and to use the premises for a reasonable time in order to enable him to elect whether he will adopt the contract and make it his own, or surrender the property to the lessor, so far as he is able to do so without affecting the term as between lessor and lessee. Where such possession is taken and the receiver within a reasonable time elects not to adopt the contract, he is bound, of course, to make reasonable compensation. The measure of compensation is not necessarily to be determined by the contract.⁵⁷

§ 2648. Reasonable Time for Adoption or Rejection of Lease.

What is a reasonable time during which the receiver may hold the premises without subjecting himself to liability on the lease depends upon the particular circumstances of each case. Two months and even longer periods have been held to be a reasonable time within which a receiver may exercise his right of election.⁵⁸

Carnwell v. Farmers' Loan etc. Co. (C. C. A.; 1896) 20 C. C. A. 282, 74 Fed. 88: A railroad had entered into a contract for the lease of a depot at an exorbitant rate. The receiver kept possession for ten months and then refused to adopt the lease. It was insisted that this was an unreasonable time and consequently that such retention of possession operated as an adoption of the lease. But it appeared that the parties both understood that the lease would not be adopted by the receiver and that the latter retained possession practically with the consent of the lessor and under an implied understanding that the receiver should occupy, subject to a reasonable rent. It was accordingly held that the receivership could not be charged with rent stipulated for in the lease and that the compensation should be on the basis of a *quantum valebat*.

Speaking on the point of the general principle, the court said: "Whatever the doubt at one time entertained as to the effect of a receiver taking possession of leasehold property under an order of a court of equity, it is now well settled that such a receiver may take and retain possession of leasehold interests for such

⁵⁷ *Kneeland v. Amer. Loan etc. Co.* (1893) 57 Fed. 803; *Farmers' Loan etc. Co. v. Northern Pac. R. Co.* (1893) 58 Fed. 257; *Platt v. Railroad Co.* (1898) 35 L. ed. 915, 918; *Quincy etc. R. Co. v. Humphreys* (1892) 145 U. S. 99, 36 L. ed. 638; *Thomas v. Western Car Co.* (1893) 149 U. S. 95, 37 L. ed. 663, 13 Sup. Ct. 824; *Park v. Railroad Co.* 60 Fed. 966.

⁵⁸ *Ames v. Union Pacific R. Co.* (1894)

reasonable time as will enable him to intelligently elect whether the interest of his trust will be best subserved by adopting the lease, and making it his own, or by returning the property to the lessor."

§ 2649. Implied Adoption of Lease from Retention of Premises.

Unexplained retention of leased premises by a receiver for three years and a half is sufficient to show an adoption by him of the contract of lease. But the presumption thus raised is rebutted where it appears that the retention of possession was under an order of court in which it was expressly provided that the retention should be without prejudice and that the making of payments by the receiver for use and occupation should not be construed as an election on his part to adopt the lease.⁵⁹

§ 2650. Possession of Premises as Affecting Adoption of Lease.

Where the circumstances are otherwise sufficient to establish liability of a receiver on a pre-existing lease, the fact that he did not have actual possession of the leased premises is not necessarily conclusive against his liability. If the decree appointing him receiver describes the leasehold by reference and directs him to take possession, he may be considered to be constructively in possession; and if the order that places the property in his care and custody also contains an injunction prohibiting all persons from interfering with the property, his possession of the leased premises is exclusive, and even the lessor could not re-enter without leave of the court or consent of the receiver.⁶⁰

§ 2651. Injunction to Enforce Specific Performance of Lease Pendente Lite.

Where a railroad receiver elects to insist on the fulfilment of a contract of lease, and the court approves of such course, it may issue an injunction upon his petition to compel the lessor to abide by and perform the lease, if the circumstances are such that specific performances of the lease is necessary to the operation of the road that is in the hands of a receiver.⁶¹

⁵⁹ *Thomas v. Cincinnati etc. R. Co.* (1896) 77 Fed. 667.

⁶⁰ *Dayton Hydraulic Co. v. Felsen-thall* (C. C. A.; 1902) 54 C. C. A. 537, 116 Fed. 961.

⁶¹ *Metropolitan Trust Co. v. Columbus etc. R. Co.* (1899) 95 Fed. 18.

*Receivership Sale.***§ 2652. Sale of Receivership Property—When Sale Complete.**

It is often necessary in receivership proceedings for the court to order a sale of the whole or part of the property involved in the receivership. Such sales are usually conducted by the receiver himself or by a master; and, in general, the same principles of procedure are applicable as in other judicial sales. At a sale by a master or receiver under an order or decree in equity which contemplates a subsequent report and a confirmation of the sale, a bidder becomes a purchaser when the officer announces the sale to him. Thereafter he may be compelled to complete his purchase and pay the price which he offered. Such a sale will not, before confirmation, be opened for bidders, in the absence of proof of fraud or of misconduct at the sale. It will not be set aside for inadequacy of price unless the inadequacy is so great as to shock the conscience.⁶² The old rule of English chancery practice to the effect that the sale is not complete or binding until confirmation has not been followed in this country, and it is now abrogated even in England.⁶³

§ 2653. Receiver Holding as Agent of Purchaser.

If the receiver retains the property in his hands after the time fixed for its delivery to the purchaser at the foreclosure sale or to any other party to the suit, he will usually be considered to hold in the capacity of agent for such purchaser or party.⁶⁴

§ 2654. Title of Purchaser as Affected by Irregularities in Sale.

In regard to the validity of the title acquired by purchase from a receiver, the same general principle applies as in other judicial sales or sales under legal process. The purchaser is not prejudiced and his title is not affected by irregularities connected with the receivership proceedings nor by any mere errors of the court. He is not bound to examine all the proceedings in the case in which the receiver was appointed. It is sufficient, so it has been held, for him to see that

⁶² *Graffam v. Burgess* (1886) 117 U. S. 180, 191, 192, 6 Sup. Ct. 686, 29 L. ed. 469, 474, 16 L. ed. 522, 523; *U. S. Trust* 839, 842, 843; *Pewabic Min. Co. v. Mason* (1892) 145 U. S. 349, 367, 12 Sup. Ct. 867, 36 L. ed. 732, 738.

⁶³ *Files v. Brown* (C. C. A.; 1903) 59 C. C. A. 403, 124 Fed. 133.

⁶⁴ *Very v. Watkins* (1859) 23 How. 541, 18 U. S. 541, 46 L. ed. 319.

there is a suit in equity in which the court appointed a receiver; that such receiver was authorized by the court to sell the property; that a sale was made under such authority; that the sale was confirmed by the court, and that the deed accurately recites the property or interest thus sold. If the title of the property vested in the receiver by order of the court, it in that case passes to the purchaser.⁶⁵ Where a transfer or sale of property by a receiver has been approved by the court of his appointment, the propriety or validity of the sale will not readily be questioned by another court.⁶⁶

§ 2655. Deed to Purchaser.

The deed to the purchaser at the foreclosure sale in receivership proceedings should be drawn in pursuance of the decree of sale and its recitals are to be read and interpreted in the light of such decree. Before the purchaser can be held, under the deed, to have voluntarily assumed a greater liability than that required or imposed by the decree, the language of the deed must be so clear and convincing as to make any other interpretation unreasonable and inadmissible.⁶⁷

§ 2656. Reservation of Right to Charge Property in Hands of Purchaser.

If a sale has been made subject to prior liens and claims, the court may, upon ordering the receiver to surrender possession to the purchaser, reserve the right to charge the property with prior claims subsequently found to be valid. Constructive control of the property is thereby retained,⁶⁸ and the court has the power to compel the purchaser to pay the claim or may subject the property to it.⁶⁹

Where a decree of sale imposes on the purchaser the obligation to pay such claims as may be filed within a certain time and which may be adjudged by the court to be a valid charge, a claim not filed within

⁶⁵ *Koontz v. Northern Bank* (1872) 16 Wall. 196, 21 L. ed. 465 (title of purchaser not defeated by irregularity incident to the fact that the receiver's deed was executed and delivered prior to confirmation of the sale by the court).

⁶⁶ *Bradley v. Marine etc. Co.* (1879) 3 Hughes 26, Fed. Cas. No. 1,789, *affirmed* (1881) 105 U. S. 175, 26 L. ed. 1034.

A party to a receivership cause who holds the receiver accountable for the proceeds of property transferred by him during the receivership cannot after-

wards question the title derived from him; and this, even though the receivership suit is finally dismissed for want of jurisdiction. *Brown v. Bass* (1866) 4 Wall. 262, 18 L. ed. 330.

⁶⁷ *Western New York etc. R. Co. v. Penn Refining Co.* (C. C. A.; 1905) 70 C. C. A. 23, 137 Fed. 343, 365.

⁶⁸ *United Trust Co. v. New Mexico* (1902) 183 U. S. 542, 46 L. ed. 312.

⁶⁹ *Atchison etc. R. Co. v. Osborn* (C. C. A.; 1906) 78 C. C. A. 378, 148 Fed. 606, 610.

the stated time and in accordance with the conditions mentioned in the decree cannot be enforced.⁷⁰

§ 2657. Estoppel of Purchaser to Question Lien.

When a receiver's sale is expressly made subject to liens, incumbrances, and mortgages, and the order confirming the sale treats a certain mortgage as a valid and subsisting charge, the purchaser is estopped to question its validity, supposing it to have been voidable only at its inception and not wholly void. But if the sale is expressly made subject only to "legal" liens and incumbrances the purchaser can maintain a bill to set aside any illegal incumbrance whatever.⁷¹

⁷⁰ *Western New York etc. R. Co. v. Penn Refining Co.* (C. C. A.; 1906) 70 1901) 50 C. C. A. 133, 112 Fed. 86.
⁷¹ *Richards v. Halliday* (C. C. A.; 1901) 50 C. C. A. 133, 112 Fed. 86.

CHAPTER LXIV.

RECEIVERS (*continued*).

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*Suit by Receiver.***§ 2658. Authority for Receiver to Sue Must Be Expressly Given.**

It often happens that in the conduct of the receivership it is necessary to bring suits in order to vindicate the rights of the receiver himself or to enforce some cause of action inhering in the person or corporation over whose property the receivership extends. It is usually proper and indeed necessary that such suits should be conducted by the receiver. But it is universally held, and the rule is fully established, that a receiver cannot maintain a suit unless authority to do so is expressly conferred upon him either by statute or by order of the court by which he was appointed. It may be admitted that the receiver by virtue of his appointment has various implied powers connected with the administration and conduct of the trust, but the right to sue is not one of them. Where a receiver is appointed in the ordinary exercise of the equity powers, it is highly appropriate that the court of appointment should have the right to say whether the funds in the hands of the receiver should be used for the prosecution of suits of any sort. Where a receiver is appointed in pursuance of a statute, the statute itself must be referred to for the purpose of ascertaining whether it is competent for the receiver to exercise this power, or even for the court of appointment to confer it on him. As the receiver has no inherent authority to sue it is customary for the court of appointment to confer on him the right to sue in all cases where it appears that occasion for the exercise of such power exists or will arise.¹

§ 2659. General and Special Authority to Sue.

The authority of the receiver to sue may be granted in general terms at the institution of the receivership, or special leave may be obtained upon the application of the receiver at any subsequent stage of the proceedings. It has been suggested in one of the state courts that it is injudicious to authorize a receiver generally to prosecute and defend, without further order of the court, any and all actions that may be brought in respect to the receivership, such authority

¹ *Davis v. Gray* (1872) 16 Wall. 219, such suits as may be necessary; *Bay* 21 L. ed. 452 (order authorizing receiver to sue in his own name); *State Gas Co. v. Rogers* (1906) 147 Fed. 559 (receiver authorized to institute actions at law or suits in equity in any court for the recovery of any estate, to take any necessary step to get in property, or demand), *Co. v. Schultz* (C. C. A.; 1897) 80 Fed. 340, 25 C. C. A. 453 (receiver authorized to take any necessary step to get in assets, and for that purpose to bring

being liable to abuse and opening a way for the squandering of the assets.² But this is a matter that should be determined in the discretion of the court upon the facts of each case.

§ 2060. In Whose Name Suit by Receiver Brought.

Assuming that the power to sue is conferred upon a receiver by the court, a question arises as to the form in which the suit should be brought. Of course if there is any statute giving him the right to sue in his own name, or if the court itself has granted leave for the receiver to maintain a suit in his own name, such statute or order is controlling. If, however, as often happens, the power is conferred in general terms without specifying in whose name the receiver shall sue, it becomes of moment to determine whether he should sue in his own name or in the name of the individual or corporation over whose property he has been appointed. There is considerable confusion in the decisions in regard to this point, and it is not easy to extract from them a well-defined rule by which one may be governed. In fact there seem to be two or three different factors that have to be taken into consideration in solving this problem, and it does not appear that the bearing of these different factors has always been clearly appreciated.

§ 2061. Action in Right of Receiver.

The first and most important consideration is that which is based on the distinction, on the one hand, between suits brought on causes of action that inhere in the receiver by virtue of his office and by virtue of the custody and possession that he may have acquired over the property, and, on the other hand, suits based on causes of action accruing to the individual or corporation over whose estate the receiver is appointed. The causes of action that belong to the receiver in his own right accrue after the appointment, while the causes of action belonging to the person over whose estate the receivership is established are commonly such as have arisen prior to the receivership. If the receiver has to sue in his own right as receiver in order to obtain or vindicate possession, or to enforce a right or obligation accruing to him as receiver, it is obvious that the suit should be brought in his own name.³ Although a receiver has not taken actual possession of the particular property included in the receiver-

² *Witherbee v. Witherbee* (1897) 17 App. Div. 131, 45 N. Y. Supp. 297. See *Sing-Frankle v. Jackson* (1887) 30 Fed. 398, 401. *erly v. Fox* (1874) 75 Pa. 112. In this case goods in the possession of a receiver

³ *Baker v. Cooper* (1869) 57 Me. 388 had been sold by him in pursuance of

ship estate, he may, under express authority to secure and protect the property, maintain a suit to enjoin the doing of an illegal act by a third person which would have the effect of diminishing the value of his trust, as, for instance, by creating a cloud on the title.⁴

§ 2662. Action in Right of Trust Estate.

If the suit is brought in the right of the person over whose estate the receiver is appointed, and in whom the title inheres, the suit should, in the absence of statute or order to the contrary, be brought in the name of that person, suing by the receiver (as a sort of next friend).⁵

§ 2663. Law and Equity.

The distinction above noted between the suit brought by the receiver in his own right and the suit brought by him in the right of the person over whose estate he is appointed is more particularly applicable where the action that the receiver is to institute is to be brought in the law side or in a court of law,⁶ though even in this case the application of the rule is subject to be controlled by the state statutes relating to procedure in actions at law. Where the suit is to be instituted in a court of equity, such court will sometimes permit the receiver to sue in his own name on a right of action that is technically vested in the person over whose estate the receivership has been established. Evidently the court of equity can afford to be more liberal in this respect than the court of law, for its procedure is more flexible and it is not bound by common-law rules of pleading.⁷

authority conferred by the court. The trustee to recover on a money demand contract of sale was with him. It was resulting from abuse of trust. While held that the suit for the purchase money the bill was originally filed in the name was properly brought in his own name. of the receiver, it was afterwards amended, "in accordance with the settled practice, so as to become a bill in the name of a corporation, brought by the receiver under the authority of the court."

⁴ *Davis v. Gray* (1872) 16 Wall. 219, 21 L. ed. 452.

⁵ *Yeager v. Wallace* (1863) 44 Pa. 294; *Dick v. Struthers* (1885) 25 Fed. 103; *Harland v. Bankers' etc. Tel. Co.* (1887) 32 Fed. 305 (receiver in suit to foreclose mortgage must sue in the name of the corporation whose property is put in his hands, where the purpose of the suit is to obtain an adjudication that certain real property is subject to the mortgage, and that adverse liens asserted in that property by other persons are invalid).

In *Bay State Co. v. Rogers* (1906) 147 Fed. 557, the suit was brought in the right of a corporation against a former

⁶ *Glenn v. Marbury* (1892) 145 U. S. 499, 510, 36 L. ed. 790, 794 (holding that the action against the stockholder of an insolvent corporation to recover unpaid assessments on his stock should be brought in the name of the company, and not in the name of the receiver, the suit being brought in the District of Columbia where common-law rules of pleading prevail).

⁷ *Phenix Ins. Co. v. Schultz* (C. C. A.; 1897) 80 Fed. 337, 25 C. C. A. 453;

§ 2664. Nature of Receivership.

Another important distinction to be borne in mind in considering whether the action should be brought in the name of the receiver or in the name of the person over whose estate he is appointed is found in the nature of the receivership and in the nature of the title or interest vested in the receiver. Where, by statute, the receiver is constituted an assignee or trustee, or a quasi-assignee or quasi-trustee, for the purpose of winding up a corporation, he should sue in his own name, for the interest is in him. This applies with special force to receivers of national banks;⁸ and it would apply of course in any case where the title is assigned to or vested in the receiver in any legitimate way. On the other hand, a suit brought by the ordinary interlocutory receiver appointed merely for the purpose of holding and conserving property *pendente lite* should, as already stated, be brought in the name of the corporation.⁹

§ 2665. Parties to Suit by Receiver.

In a suit by a receiver to protect the trust property, the creditors of the corporation of whose property he is receiver are not proper parties. So far as their interests are concerned he is their sufficient representative.¹⁰

§ 2666. Orders Incident to Allowing Suit by Receiver.

In authorizing a receiver to bring certain suits against persons liable to his insolvent, the court may order that such suits shall be prosecuted exclusively for the benefit of such creditors of the insolvent as may elect to indemnify the receiver against the costs and expenses of the litigation and that creditors not so contributing and aiding shall be excluded.

McEwen v. Harriman Land Co. (C. C. A.; 1905) 138 Fed. 797, 809, 71 C. C. A. 163: In giving effect to an order of this kind and thereby excluding from the benefit of the recovery parties who had had notice of the order but who had failed to comply with its terms, the court said: "Their failure so to do cut them off from all right to share in said fund. Said order is a barrier in the way of such

Schultz v. Phenix Ins. Co. (1896) 77 Fed. 375. In this suit it was held that the power "to bring such suits" as might be necessary to get in the assets of the company should be so construed as to allow the receiver to sue in his own name in a court of equity to enforce a contract to insure, which contract had been made with the insolvent.

⁸ *Kennedy v. Gibson* (1869) 8 Wall. 498, 506, 19 L. ed. 476, 479.

⁹ *Bay State Gas Co. v. Rogers* (1906) 147 Fed. 559.

¹⁰ *Gray v. Davis* (1871) 1 Woods 420. Fed. Cas. No. 5715.

right, and it would be inequitable to permit them to stand by and see others execute the bonds and incur the expense involved, and then come in and share in the result."

§ 2667. Allegation of Receiver's Representative Capacity.

A receiver sues in his representative capacity and it is therefore necessary for him, in any action brought by him as receiver, to allege and prove his representative and official character. He must set out facts showing his appointment and the jurisdiction in which it was made. He should also set out so much of the proceedings in the cause as may be necessary to define his character and show that the appointment was legal. In other words, the receiver, like any other person suing in a representative capacity, must show his right and title to maintain the suit.¹¹ The receiver should allege that leave of the court to institute and prosecute the action has been obtained.¹²

§ 2668. Defense to Action by Receiver.

As a receiver obtains no higher interest and can have no better right than the person to whose estate he succeeds, it follows that in any action brought by him the defendant may make any defense that would have been available if the action had been brought against the person whose estate is in the hands of the receiver. Rights of action in the hands of a receiver are therefore subject to any set-off or counterclaim existing at the time of his appointment.¹³ In conformity with this it has been held that where a receiver of a national bank sues upon a note or obligation due to the bank, the maker may set off any deposit or certificate of deposit held by him at the time the bank was put in the hands of the receiver.¹⁴ The fact that the note on which the receiver sues does not mature until after his appointment is not material on the question of the right of set-off.¹⁵

¹¹ *Worth v. Wharton* (1898) 122 N. C. 376, 29 S. E. 370; *Hegewisch v. Silver* (1893) 140 N. Y. 414; *Miami Exporting Co. v. Gano* (1844) 13 Ohio 269; *Swing v. White River Lumber Co.* (1895) 91 Wis. 517, 65 N. W. 174.

A general allegation that the plaintiff was duly appointed receiver in a certain court in a stated proceeding has been held sufficient to make out the receiver's title, without stating further particulars. *In re Beecher's Estate* (1892) 19 N. Y. Supp. 971.

¹² *Hatfield v. Cummings* (1895) 142 Ind. 350, 39 N. E. 859; *Davis v. Ladoga Creamery Co.* (1890) 128 Ind. 222, 27 N. E. 494.

¹³ *Wheaton v. Daily Tel. Co.* (C. C. A.; 1903) 134 Fed. 61, 59 C. C. A. 427; *Fischer v. Knight* (C. C. A.; 1894) 61 Fed. 491, 9 C. C. A. 582; *Yardley v. Clothier* (1892) 49 Fed. 341.

¹⁴ *Scott v. Armstrong* (1892) 146 U. S. 499, 36 L. ed. 1059, 13 Sup. Ct. 148; *Snyders v. Armstrong* (1888) 37 Fed. 18, (*criticising Armstrong v. Scott* (1888) 36 Fed. 63, and *Bung Co. v. Armstrong* (1888) 34 Fed. 94).

¹⁵ *Scott v. Armstrong* (1892) 146 U. S. 499, 36 L. ed. 1059, *reversing Armstrong v. Scott* (1888) 36 Fed. 63.

§ 2669. Refusal of Receiver to Sue.

If a receiver declines to prosecute a suit on behalf of the insolvent corporation of which he is receiver, the company itself may prosecute such suit, making the receiver a defendant and alleging his refusal to act.¹⁶

Suit by Receiver in Foreign Court.

§ 2670. Receiver Cannot Sue in Foreign Jurisdiction.

In the administration of receiverships it not infrequently happens that property pertaining to the receivership (and which the receiver desires to get into his possession) is situated in a jurisdiction other than that of the court appointing the receiver, and it sometimes becomes desirable that the receiver should be allowed to enforce personal as well as real rights of action in a foreign jurisdiction. The natural and reasonable thing to do in a situation of this kind would apparently be for the court of appointment to authorize its receiver to bring suit in the foreign jurisdiction. Upon being clothed with this power, it would seem to be proper for the receiver to resort to the foreign tribunal and there institute suit upon such causes of action as might be enforceable in that forum. This course, however, is not feasible in the federal courts, for it is now fully settled in these courts that a receiver has no legitimate extraterritorial power of official action. The appointment of a receiver does not in itself give him any authority to acquire possession of property beyond the jurisdiction of his appointment; and it is not competent for the court, even if it should desire to do so, to confer upon him a power to go into a foreign jurisdiction and there assert any authority whatever, or exercise any function, as receiver. No rule is now more authoritatively settled than that which disables the receiver from suing in a foreign jurisdiction. The right of a receiver to sue in a foreign court cannot be upheld as a mere incident to the office of a receiver. Nor can the court of his appointment clothe him with such power; and any attempt to confer any such authority on him is futile.¹⁷ An express order in general terms authorizing a receiver to bring suit in his own

¹⁶ *North Chicago St. R. Co. v. Chicago v. Hale* (1902) 117 Fed. 224, 54 C. C. A. Union Traction Co. (1907) 150 Fed. 612. 252; *Cohen v. Gold Creek etc. Co.* (1899)

¹⁷ *Covell v. Fowler* (1906) 144 Fed. 95 Fed. 580; *Kittel v. R. Co.* (1897) 78 535; *Fowler v. Osgood* (1905) 141 Fed. Fed. 855; *Holmes v. Sherwood* (1881) 20, 24, 4 L.R.A. (N.S.) 824, 72 C. C. A. 16 Fed. 725; *Brigham v. Luddington* 276; *Edwards v. Nat. Window Glass etc.* (1874) 12 Blatchf. 237, Fed. Cas. No. Assoc. (1905) 139 Fed. 795; *Wigton v.* 1,874; *Lehigh Coal etc. Co. v. Central R. Bosler* (1900) 102 Fed. 70, 73; *Hilliker Co.* (1877) Fed. Cas. No. 8,213,

name or in the name of the corporation is without validity when it comes to suing in a foreign jurisdiction;¹⁸ and such an order must be construed as an authority to institute suit in the jurisdiction of appointment and not elsewhere.¹⁹

Booth v. Clark (1854) 17 How. 322, 15 L. ed. 164: Under a creditors' bill filed in a court of chancery in New York state a receiver was appointed. Upon a showing made by him to the effect that the debtor had been awarded a sum of money on a claim against the Mexican government, the court authorized the receiver to sue for the same. This suit had to be brought in a court of the District of Columbia. It was held that the suit could not be maintained.

This case settled the practice in the federal courts, and it effectually limits the receiver, in so far as he derives his authority to sue from his appointment as receiver, to such actions as he may be authorized to bring, either in his own name or in that of the insolvent corporation, within the jurisdiction wherein he was appointed.

Great Western Min. Co. v. Harris (1905) 198 U. S. 561, 49 L. ed. 1163: The doctrine established in the leading case was here expounded by Mr. Justice Day as follows: "The decision in *Booth v. Clark* rests upon the principle that the receiver's right to sue in a foreign jurisdiction is not recognized upon principles of comity, and the court of his appointment can clothe him with no power to exercise his official duties beyond its jurisdiction. The ground of this conclusion is that every jurisdiction, in which it is sought by means of a receiver to subject property to the control of the court, has the right and power to determine for itself who the receiver shall be, and to make such distribution of the funds realized within its own jurisdiction as will protect the rights of local parties interested therein, and not permit a foreign court to prejudice the rights of local creditors by removing assets from the local jurisdiction without an order of the court or its approval as to the officer who shall act in the holding and distribution of the property recovered."

§ 2671. Doctrine of State Courts—Foreign Receiver Allowed to Sue by Comity.

This rule of federal practice stands out in sharp contrast with that which prevails in the courts of most of the states of the Union. It is, to be sure, universally accepted that a receiver appointed in one jurisdiction has no absolute right to bring suit in another; but the

¹⁸ *Hale v. Allinson* (1903) 188 U. S. Augusta etc. R. Co. (1897) 78 Fed. 855; 56, 47 L. ed. 390 (reversing *Hale v. Har-* Wigton *v. Bosler* (1900) 102 Fed. 70; don (1899) 95 Fed. 747, 37 C. C. A. 240); *Hilliker v. Hale* (1902) 117 Fed. 224, *Brigham v. Luddington* (1847) 12 54 C. C. A. 252. *Blatchf. 237*; *Philadelphia etc. Iron Co.* ¹⁹ *Hazard v. Durant* (1884) 19 Fed. *v. Daube* (1896) 71 Fed. 583; *Kittel v.* 471, 477.

prevailing doctrine in the state courts is to the effect that a receiver appointed in one jurisdiction will be allowed to sue in another upon the ground of comity.²⁰ Such being the doctrine prevailing in most of the states, it is not surprising that this notion of the receiver being allowed to sue by comity should have filtered from time to time into the decisions of the federal courts. We accordingly find numerous *dicta* in the decisions of the circuit courts to the effect that a receiver may be allowed to sue on the ground of comity; and in some cases it has been erroneously ruled in accordance with this view.²¹ But the notion in question receives no countenance in the supreme court.

§ 2672. Suit by Foreign Receiver Where No Objection Made.

If the party defendant does not make timely objection by demurrer or other proper proceeding, a decree rendered against him in a suit instituted by a foreign receiver will possibly not be reversed on appeal, the maintenance of the suit not being in violation of any law of the state, nor in any way contrary to its public policy.²² And certainly if no objection is at any time taken, either in the lower court or on appeal, to the jurisdiction of the court of first instance to entertain a suit brought by a foreign receiver, a decree will be entered in his favor, if the situation in other respects warrants this step.

Great Western Tel. Co. v. Purdy (1896) 162 U. S. 329, 40 L. ed. 986: A suit was successfully maintained in Iowa by a receiver of a corporation, appointed by a court in Illinois, to recover an assessment upon a stock subscription. The jurisdiction of the Iowa court was not called in question in the state court of Iowa (where the suit was originally brought) nor in the federal court to which the suit was removed. Nor was the question raised in the federal court below nor on appeal in the supreme court. If the question had been properly and timely raised, the plaintiff could not have recovered.²³

²⁰ Am. & Eng. Enc. Law (2d ed.) 1108. may be accepted as authority on the point stated, though this point was not made the basis of the decision. The actual holding here, to the effect that a receiver may sue in a foreign jurisdiction if the court of such jurisdiction deems fit to allow it on grounds of comity, is squarely contrary to the repeated utterances of the supreme court. *Hale v. Allinson* (1902) 188 U. S. 68.

²¹ *Hale v. Hardon* (C. C. A.; 1899) 95 Fed. 747, 37 C. C. A. 240; *Lewis v. Clark* (C. C. A.; 1904) 129 Fed. 570, 64 C. C. A. 138; *Lewis v. American Naval Stores Co.* (1902) 119 Fed. 391; *Hale v. Tyler* (1900) 104 Fed. 757; *Rogers v. Riley* (1896) 80 Fed. 759; *Failey v. Talbee* (1893) 55 Fed. 892; *Olney v. Tanner* (1882) 10 Fed. 101, 104; *Chandler v. Siddle* (1874) 3 Dill. 479. See *The Willamette Valley* (1895) 68 Fed. 565, 13 C. C. A. 635.

²² *Lewis v. Clark* (C. C. A.; 1904) 129 Fed. 570, 64 C. C. A. 138. This decision

²³ See observation of Mr. Justice Day in *Great Western Min. Co. v. Harris* (1905) 198 U. S. 577, 578, 49 L. ed. 1169.

§ 2673. What Courts Considered Foreign to Each Other.

Federal courts and state courts, whether situated in the same or different states, are foreign to each other within the meaning of the rule now under consideration; and federal courts situated in different states are also foreign to each other. But it has been held that where a state is divided into two or more districts and process from one is permitted to run into the other, the authority of the receiver will be allowed to extend throughout the state. In other words, the jurisdiction of a court through its receiver is co-extensive with the limits of the authority of the court to sequester the property of the insolvent.²⁴

§ 2674. Exceptions to Rule Disabling Receiver to Sue in Foreign Court.

The rule that a receiver does not have and cannot be given authority to sue in a foreign jurisdiction applies only in those cases where the right in which he sues is based upon his character as receiver and upon his authority as representative of the court of equity. It has no application to cases where his right to sue is based on an acquired title to the property in respect to which the suit is brought. If by assignment, or by statute, or even by contract, a receiver obtains a title or interest sufficient to give him a standing in a foreign court apart from his character as receiver, there is no difficulty about his maintaining the suit in the foreign court. This idea is illustrated in many decisions from the federal courts.

1. *Relfe v. Rundle* (1880) 103 U. S. 222, 26 L. ed. 337: A final decree of a court of equity dissolved an insolvent life insurance company and, by statute, vested the entire property of the company in the superintendent of the insurance department of the state, for the use and benefit of creditors and policyholders. The effect of the statute was to make him a successor of the corporation for the purpose of winding up its affairs. As such he was held to be the representative of the corporation at all times and places and in all matters connected with its business. Accordingly he was permitted to sue in a foreign jurisdiction.

2. *Hawkins v. Glenn* (1889) 131 U. S. 319, 33 L. ed. 184: Glenn was the trustee of the corporation, which by its deed assigned and transferred to three trustees, for whom he was afterwards substituted, all the property and effects of the corporation, in trust, for the payment of its debts. Glenn subsequently brought a suit in another jurisdiction against a stockholder, Hawkins. The right of Glenn was through an assignment, and he derived title to the property and to the rights of the corporation through a deed. The plaintiff, being a trustee and having title in himself, was in a different position from that of the ordinary receiver, and was therefore entitled to sue.

²⁴ *Horn v. Pere Marquette R. Co.* (1907) 151 Fed. 626, 631.

3. *Oliver v. Clarke* (C. C. A.; 1901) 106 Fed. 402, 45 C. C. A. 360: A receiver appointed under the decree of a court in Wisconsin was permitted to sue in Texas to recover real estate the title to which had been conveyed to him as receiver. He claimed under the conveyance as such, and did not depend upon authority derived from the court of his appointment.

4. *Wilkinson v. Culver* (1885) 25 Fed. 639: A receiver appointed in New Jersey recovered judgment, in the court of his domicile, upon promissory notes. He then sued on this judgment in a foreign jurisdiction. His right to maintain the suit was upheld. Said the court: "The plaintiff does not sue because he is receiver, but because he is a judgment creditor. The action is on the judgment. He must, in order to recover, prove the judgment. He is not required to prove his title as receiver; that was done in the action in New Jersey upon the notes. It was necessary there, in order to obtain the judgment; but, having obtained it, the plaintiff, as an individual, can maintain the present suit."

5. *Lee v. Terbell* (1889) 40 Fed. 44: The plaintiffs as special commissioners appointed by the circuit court in Virginia to sell mortgaged property were authorized to take the bonds of the purchaser in part payment. These were made payable to the commissioners as such. They afterwards brought suit on one of these bonds in a foreign jurisdiction. The right so to sue was upheld because the contract evidenced by the bond was made with them. It was said: "The general rule is familiar that a suit in another state cannot be maintained by persons coming *en autre droit* under the appointment of foreign laws, unless their appointments are repeated under the laws of the state in which they sue. But where, as here, the contract sought to be enforced is made directly to the persons who sue, although they are described in their official characters, it would seem that the suit can be brought by such persons in a foreign jurisdiction in their own names, without the addition of their official character, and that the *descriptio personarum* may be rejected as mere surplusage. However this may be, the plaintiffs can sue here upon the promise made to them, just as a foreign executor could sue in such a case without an ancillary appointment here."

6. *Parsons v. Charter Oak Life Ins. Co.* (1887) 31 Fed. 305: The receiver of an insurance company appointed under the laws of Connecticut for the winding up of the affairs of the corporation was allowed to intervene in a suit brought to secure an independent receivership in Iowa, and that suit was dismissed at the instance of such intervening receiver appointed in Connecticut. The right of the latter to the assets of the company was fully recognized and the receiver appointed in Iowa was discharged. This case has been cited as authority in favor of the right of the general receiver of a corporation to sue in a foreign jurisdiction, and hence has been supposed to be an exception to the general rule. But clearly not so. His right to intervene for the purpose of showing his right and procuring a dismissal of an independent receivership proceeding was indeed recognized, but the court indicated that the proper proceeding in Iowa was by means of an ancillary receivership, and it was accordingly ordered that an ancillary receiver be there appointed to take possession of the assets, convert the same into money, and remit the proceeds to the receiver in Connecticut. The Connecticut receiver was merely allowed to intervene, not to sue in Iowa.

§ 2675. Effect of Assignment to Receiver—Prior Superior Title.

Though by assignment a receiver may acquire a title to property which will enable him to maintain a suit in a foreign jurisdiction, a

right so acquired cannot have effect as against persons who have acquired a superior right to the property in the foreign jurisdiction prior to the assignment under which the receiver claims. In other words, an assignment of property to a receiver can have effect only from the time when it is made.²⁵

Suit Against Receiver.

§ 2676. Receiver Not Suable Except by Leave of Court.

As a receiver is not permitted to sue without the leave of the court of his appointment, so likewise it is a rule that he cannot be sued without leave of such court. It is a general principle of equity practice that a suit cannot be brought against a receiver, in his capacity as such, to recover any property in his hands or to recover on any debt, demand, or claim whatever, against him, unless upon previous leave first duly obtained.²⁶ The rule applies to suits brought either in that court or in any other court; and if an unauthorized suit be brought against the receiver, he may successfully plead the disability of the plaintiff.²⁷

A receiver may, however, waive the right to object on this score, and he will not be allowed to take advantage of want of leave where no objection is made until after proof has been taken. Leave of court to institute the suit will be presumed from orders made by the court to facilitate the progress of the suit.^{27a}

One who institutes suit against a receiver without leave thereby renders himself subject to proceedings for contempt and is liable to punishment.²⁸ The court entertaining the receivership may also restrain any such proceeding by injunction.²⁹

§ 2677. Basis of Receiver's Immunity from Suit.

The rule by which a receiver enjoys immunity from being harassed by suits instituted by other persons against him in his official

²⁵ *Zacher v. Fidelity etc. Co.* (C. C. Sampson (1852) 14 How. 52, 14 L. ed. A.; 1901) 106 Fed. 593, 45 C. C. A. 480: 322; *Davis v. Gray* (1872) 16 Wall.

²⁶ *Barton v. Barbour* (1881) 104 U. S. 203, 21 L. ed. 447.

126, 26 L. ed. 672; *People's Bank v. Cal-* ^{27a} *Jerome v. McCarter* (1876) 94

houn (1880) 102 U. S. 256, 26 L. ed. 101; U. S. 734, 24 L. ed. 136.

Foreman v. Central Trust Co. (C. C. A.; ²⁸ *In re Tyler* (1893) 149 U. S. 164,

1896) 18 C. C. A. 321, 71 Fed. 776; 37 L. ed. 689; *Southern Express Co. v.*

Louisville Trust Co. v. Cincinnati (C. C. Railroad Co. (1878) 99 U. S. 191, 25 L.

A.; 1896) 22 C. C. A. 334, 76 Fed. 296; ed. 319; *People's Bank v. Calhoun*

Ridge v. Manker (C. C. A.; 1904) 67 C. (1880) 102 U. S. 202, 26 L. ed. 102;

C. A. 596, 132 Fed. 599; *Minot v. Mastin* Texas etc. R. Co. v. Cox (1892) 145 U.

(C. C. A.; 1899) 37 C. C. A. 234, 95 Fed. S. 601, 36 L. ed. 732; *Taylor v. Carryl*

734. (1857) 20 How. 594, 15 L. ed. 1031;

²⁷ *Porter v. Sabin* (1893) 149 U. S. *Thompson v. Scott* (1876) 4 Dill. 508.

479, 37 L. ed. 818; *In re Tyler* (1893) ²⁹ *Jones v. Schlapback* (1896) 81 Fed.

149 U. S. 182, 37 L. ed. 695; *Wiswall v.* 274.

capacity is primarily based on the idea that the trust estate is being administered by the court through the hands of its receiver and consequently that this court itself should have the right to adjudicate upon all claims pertaining to the trust. It has sometimes been supposed that the rule in question is limited to situations where the plaintiff seeks to strip the receiver of the possession and control of property held by him as receiver. The supreme court, however, has applied the rule in a broader sense, and has held that no suit whatever can be maintained against the receiver without leave.³⁰ It has been said that if a stranger were permitted to maintain an independent suit against the receiver without leave, he could, after recovering judgment, proceed to enforce satisfaction and thereby obtain advantage over other claimants.³¹

§ 2678. Act Done in Private Capacity.

Leave of the court to sue its receiver is not necessary where he has done an act entirely without the legitimate scope of the receivership and has thereby rendered himself personally liable. If a receiver wrongfully takes possession of the property of another, having no color of right thereto as receiver, an action of trespass will lie against him without leave of the court.³²

§ 2679. Discretion of Court in Granting Leave to Sue.

In passing upon an application for leave to sue its receiver the court of equity exercises a sound judicial discretion. The court will determine whether it is more desirable to protect its receiver from suit entirely or to allow him to be sued in some appropriate form of action and in some convenient forum. Leave will not be arbitrarily denied, but only on the ground of the impropriety or inconvenience of allowing the suit to be maintained. Of course every person having a legal interest to protect is entitled to maintain some sort of proceeding, and if he is not allowed to sue independently, he is clearly entitled to intervene in the receivership cause or to maintain an independent suit when the receivership has been concluded. All that the court of equity therefore has to do is to determine which course is the more desirable to pursue; and leave will be granted if it appears to be proper, but not otherwise.³³

³⁰ *Barton v. Barbour* (1881) 104 U. S. 126, 26 L. ed. 672. See *Curran v. Craig* (1884) 22 Fed. 101. *Barton v. Barbour* (1881) 104 U. S. 134.

³¹ *Thompson v. Scott* (1876) 4 Dill. 26 L. ed. 676.

508, Fed. Cas. No. 13,975.

³² *In re Young* (1884) 7 Fed. 855; *tral Vermont R. Co.* (1898) 84 Fed. 917.

³³ *American Loan & Trust Co. v. Central Vermont R. Co.* (1898) 84 Fed. 917.

A petition for leave to sue a receiver will not be granted where the petition fails to show a good cause of action.³⁴

§ 2680. Leave to Sue Receiver in Foreign Court.

An order of court granting general leave to bring suit against a receiver will usually be understood only as authorizing a suit to be brought against him in the particular court where the receivership is pending.³⁵ But the court appointing a receiver has power to authorize a suit to be brought against him in the court of another jurisdiction. Such an order does not confer on the foreign court any administrative power over the receivership property or over the receiver.³⁶

§ 2681. Order Granting General Leave to Sue.

Leave to sue the receiver may be granted upon special application of the party desiring to institute suit, and at any stage of the proceedings prior to the final winding up of the receivership. But the court may, by a general order granted at the time of the appointment of the receiver, give leave to sue in general terms, thereby subjecting the receiver to liability to sued without special leave.³⁷

§ 2682. Conditions Incident to Granting Leave to Sue.

Upon granting leave to sue its receiver the court may attach any reasonable condition to the order, and if necessary, it may modify or revoke an order improvidently granted. Where the court, at the time of granting leave, reserves the right to determine upon the forum in which the suit may be brought, it may subsequently enjoin a proceeding in an independent forum and restrict the plaintiff to the right to institute a proceeding in the court where the receivership cause is pending.³⁸

§ 2683. Incidents of Suit against Receiver.

Independent suits brought against receivers must conform to the ordinary principles governing legal procedure. Thus an original bill

³⁴ *Jordan v. Wells* (1878) Fed. Cas. No. 7,525. was to the effect that persons having demands or claims of any character

³⁵ *Palmer v. Scriven* (1884) 21 Fed. 354; *Harper v. Printing-Telegraph News Co.* (1904) 128 Fed. 979. against the receiver might bring suit thereon against the receiver in any court having jurisdiction in the state,

³⁶ *French v. Union Pac. R. Co.* (1899) 92 Fed. 26. and without applying for leave.

³⁷ *Dow v. Memphis etc. R. Co.* (1884) C. A.; 1905) 68 C. C. A. 345, 125 Fed. 20 Fed. 260, 266. The order in this case

³⁸ *Buckhannon etc. R. Co. v. Davis* (C. 707, (1904) 131 Fed. 115.

cannot be maintained against a receiver unless it states a cause of equitable cognizance.³⁹ The order granting leave to sue a receiver is without prejudice to his right to set up any available defense, and this can be done by plea, answer, or demurrer.⁴⁰

§ 2684. Form of Process against Receiver.

A suit brought against a receiver upon leave of the court of appointment is brought against him in his capacity as receiver, and the process should run against him in his individual name, followed by words descriptive of his official capacity.⁴¹

Statutory Right to Sue Receiver.

§ 2685. Statute Allowing Receiver to Be Sued without Leave.

The general rule which disables all persons from instituting and prosecuting suits against a receiver, unless upon leave of the court of appointment, has been pretty effectually done away with by the following statute.

Act of Aug. 13, 1888, ch. 366, sec. 3: Every receiver or manager of any property appointed by any court of the United States may be sued in respect of any act or transaction of his in carrying on the business connected with such property, without the previous leave of the court in which such receiver or manager was appointed; but such suit shall be subject to the general equity jurisdiction of the court in which such receiver or manager was appointed, so far as the same shall be necessary to the ends of justice.⁴²

³⁹ *Nash v. Ingalls* (1897) 79 Fed. 510, (1900) 41 C. C. A. 545, 101 Fed. 645.

⁴⁰ *Davis v. Duncan* (1884) 19 Fed. 477.

⁴¹ See *Frankle v. Jackson* (1887) 30 Fed. 398, 401.

Where suit is to be brought against a corporation that is in the hands of a receiver, process on the corporation should be served on the receiver, for he represents it. *State v. Port Royal etc. R. Co.* (1898) 84 Fed. 67.

⁴² 25 Stat. L. 436. This act is amendatory of the Act of March 3, 1887, ch. 373, sec. 3, but the changes thus made are not of a material character.

The statute conferring the right to sue receivers without leave has been considered in a number of cases. The following are here noted in addition to those cited elsewhere in this connection.

Texas etc. R. Co. v. Cox (1892) 145 U. S. 593, 36 L. ed. 829, 12 Sup. Ct. 905; *Eddy v. Lafayette* (1896) 163 U. S. 456, 41 L. ed. 225, 16 Sup. Ct. 1082; *Eddy v. Lafayette* (C. C. A.; 1892) 1 C. C. A. 441, 49 Fed. 807; *Central Trust Co. v. St. Louis etc. R. Co.* (1889) 40 Fed. 426; *Missouri Pacific R. Co. v. Texas Pacific R. Co.* (1890) 41 Fed. 311; *Jones v. The St. Nicholas* (1891) 49 Fed. 671; *Central Trust Co. v. Chattanooga etc. R. Co.* (1895) 68 Fed. 685; *Stateler v. California Nat. Bank* (1896) 77 Fed. 43; *Wheeler v. Smith* (1897) 81 Fed. 319.

A state statute authorizing suits to be brought against the receiver without leave is not effective as regards suits against receivers appointed by federal courts. *Hale v. Duncan* (1877) Fed. Cas. No. 5,914.

§ 2686. Nature of Cause on which Receiver Suable.

It will be noted that the cause of action upon which suit may be brought under this statute must be one arising out of the acts or transactions of the receiver in conducting the receivership. The statute does not extend to contracts and causes of action originating before the institution of the receivership, nor to causes of action unconnected with the receivership.⁴³ The proving of a counterclaim or set-off against a receiver is within the spirit and meaning of the act allowing receivers to be sued.⁴⁴ But a garnishment proceeding is not.⁴⁵

§ 2687. In What Court Suit May Be Brought.

Under this statute an action may be brought in any court, state or federal, having jurisdiction of the parties and of the subject-matter. The action is not limited to the court appointing the receiver or even to a federal court.⁴⁶

§ 2688. Limitation on Statutory Right to Sue.

The most important feature of this statute, so far as regards equity practice, is found in the reservation contained in the second clause. This reservation has at least two important effects, namely, (1) it prevents the creditor who is thus permitted to sue from obtaining any undue advantage over other creditors and claimants, and (2) it prevents such creditor from depriving the receiver, and through the receiver, the court, of the possession or control of any property in his hands by virtue of the receivership.⁴⁷ Land held by a court through its receiver cannot be condemned for use under the power of eminent domain, unless leave of the court has been obtained for the condemnation proceedings. The statute allowing receivers to be sued without leave of court in respect to their official acts does not apply here.⁴⁸

⁴³ *Swope v. Villard* (1894) 61 Fed. 37 L. ed. 689; *Comer v. Felton* (C. C. A.; 417; *Farmers' Loan etc. Co. v. Green* 1894) 10 C. C. A. 28, 61 Fed. 731; *J. I. Bay etc. R. Co.* (1891) 45 Fed. 665; *Case Plow Works v. Finks* (C. C. A.; 1897) 26 C. C. A. 46, 81 Fed. 529; *Dill R. Co.* (1894) 59 Fed. 523; *The Jonas H. Ingham v. Hawk* (C. C. A.; 1894) 23 French (1902) 119 Fed. 462. L.R.A. 517, 9 C. C. A. 101, 60 Fed. 497.

⁴⁴ *Grant v. Buckner* (1898) 172 U. S. 232, 43 L. ed. 430, 19 Sup. Ct. 163. *St. Louis Southwestern R. Co. v. H-I-brook* (C. C. A.; 1896) 19 C. C. A. 385, 73 Fed. 112.

⁴⁵ *Central Trust Co. v. East Tennessee etc. R. Co.* (1894) 59 Fed. 523. ⁴⁶ *Coster v. Parkersburg Branch R. Co.* (1904) 131 Fed. 115; *Buckhammon*

⁴⁷ *McNulta v. Lochridge* (1891) 141 U. S. 327, 35 L. ed. 796; *Erb v. Morasch* (1900) 177 U. S. 584, 44 L. ed. 897. *etc. R. Co. v. Davis* (C. C. A.; 1905) 68 C. C. A. 345, 135 Fed. 707.

⁴⁸ *In re Tyler* (1893) 149 U. S. 164,

The provision that the independent suit against a receiver shall be subject to the general equity jurisdiction of the court in which the receiver was appointed does not make it competent for the appointing court to determine the rights of persons who are not before it or subject to its jurisdiction.⁴⁹

§ 2689. When State Court Cannot Enjoin Receiver.

A state court cannot, under this statute, enjoin a receiver appointed by a federal court from carrying out the decree of his court. It is obvious that the statute must be construed as authorizing suit against the receiver only in cases where he is subject to some sort of legal liability. The receiver manifestly incurs no liability in carrying out the decree of the court, and hence he is not subject to suit at the instance of any one. Besides, the reservation in favor of the general equity jurisdiction of the court of appointment operates to prevent the maintenance of such a suit.⁵⁰

§ 2690. Jurisdiction of Suit by or against Receiver.

A receiver appointed by a federal court derives his authority as such from the laws of the United States, and therefore suits brought by him or against him are maintainable in any federal court without regard to any other jurisdictional fact, as for instance, without regard to the citizenship of the parties.⁵¹

§ 2691. Citizenship of Receiver as Affecting Jurisdiction.

In a suit brought by or against a receiver, if the jurisdiction of the federal court depends on diversity of citizenship as it may where the receiver is appointed by a state court, the individual citizenship of the receiver is to be considered, not the citizenship of the person or corporation over whose estate he has been appointed.⁵²

⁴⁹ *Texas etc. R. Co. v. Johnson* (1894) 151 U. S. 81, 38 L. ed. 81. *Keihl v. South Bend* (C. C. A.; 1896) 36 L.R.A. 228, 22 C. C. A. 618, 76 Fed.

⁵⁰ *Royal Trust Co. v. Washburn etc.* 921; *Bausman v. Denny* (1896) 73 Fed. R. Co. (1902) 113 Fed. 531, (C. C. A.; 69. 1905) 71 C. C. A. 579, 139 Fed. 865.

⁵¹ *Rouse v. Hornsby* (1896) 161 U. S. 353; *Brisenden v. Chamberlain* (1892) 588, 40 L. ed. 817, 16 Sup. Ct. 610; 53 Fed. 307. ⁵² *Davies v. Lathrop* (1882) 12 Fed.

CHAPTER LXV.

RECEIVERS (*continued*).

Ancillary Receivers.

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- 2693. When Ancillary Receiver Unnecessary.
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Ancillary Receivers.

§ 2692. Occasion for Institution of Ancillary Receivership.

In the preceding chapter we had occasion to consider the peculiarity of the federal practice by which a receiver is unable to sue, even on the ground of comity, in a court of a foreign jurisdiction. It might be supposed that this rule would be fraught with great inconvenience, not to say injustice, in winding up the affairs of corporations or individuals doing business in different states and having assets distributed over a large territory. The difficulty is met, however, by the very convenient and satisfactory practice of instituting ancillary receiverships and appointing ancillary receivers in such foreign jurisdictions where the same becomes desirable or necessary. The practice of appointing ancillary receivers is indeed one of the striking features of the system built up by the federal courts for the administration and winding up of any business in the hands of a receiver, and especially insolvent corporations. It affords the only method for reaching and administering property or assets in a jurisdiction foreign to that where the receiver is originally appointed.¹ The federal courts will appoint ancillary receivers in aid of original receivership proceedings in state courts with the same readiness as in cases where the original proceedings have been brought in a federal court.²

¹ *Fowler v. Osgood* (C. C. A. 1905) 141 Fed. 20, 4 L.R.A. (N.S.) 824, 72 C. C. A. 276.

Of this system it has been well said: "It works smoothly in practice. It effectively protects the rights of possible creditors in each jurisdiction where assets are found, by compelling the foreign receiver to give reasonable security and to submit himself to the orders of the local court before removing assets which may be needed to meet the claims of domestic creditors. It provides a convenient forum in which such creditors may prove their claims. It enables the receiver appointed by a foreign court, without delay or publicity or unreasonable expense, to qualify himself to collect or impound assets properly forming part of the estate under administration. It avoids unseemly conflicts of judicial authority. It provides a central tribunal for the determination of those questions of general policy which must be decided with reference to a great system of railways or a great business undertaking, while leaving to local tribunals full power over questions of a local nature." In argument, *Great Western Min. Co. v. Harris* (1905) 198 U. S. 572, 573, 40 L. ed. 1167.

² *Sands v. Greeley & Co.* (C. C. A.; 1898) 88 Fed. 130, 31 C. C. A. 424; *Shinney v. North American etc. Co.* (1899) 97 Fed. 9, 11.

Ancillary receivers are sometimes ap-

§ 2693. When Ancillary Receiver Unnecessary.

An ancillary suit for the appointment of an ancillary receiver is not necessary where the property to be administered lies within a particular state but in different federal districts, provided the court of one district has and can exercise jurisdiction over the property of the insolvent throughout the entire state. Federal courts of different states are undoubtedly foreign courts as to each other in as full sense as are state courts of different jurisdictions. But a federal court of one district is not a foreign court as to another federal court of the same state. Federal courts are courts of the whole state. Manifestly this is so where by statute the federal court of one district is authorized to exercise jurisdiction over persons or property in another district of the same state and where the process of a court can run into another district of the same state.³

§ 2694. Jurisdiction in Ancillary Receivership Proceedings.

Though the bill seeking the appointment of a receiver in another district than that in which the main receivership cause is pending is commonly spoken of as an ancillary suit, such a proceeding is distinguished from all other ancillary suits and proceedings by the circumstance that in this case jurisdiction is not dependent on the jurisdiction in the main cause. The bill seeking the appointment of an ancillary receiver must therefore be framed as an original bill, and so far as the power of the ancillary court is brought into play the proceeding is wholly independent. The proceeding is ancillary only in the sense that it is brought in aid of the proceedings in the main cause. A suit for an ancillary receiver cannot be maintained merely for the purpose of obtaining a ratification by the court of one jurisdiction of what has been done in a court of another jurisdiction.⁴ Ancillary receivership proceedings are usually conducted in a spirit of comity, and with an eye to the prevention of unnecessary conflict in the administration of the trust; but in all essential respects the proceedings in the two respective causes rest upon their own distinct basis.⁵

pointed in bankruptcy proceedings. *In re John L. Nelson & Bro. Co.* (1907) 149 Fed. 590; *In re Erie Lumber Co.* (1906) 150 Fed. 830.

³ *Horn v. Pere Marquette R. Co.* (C. C. A.; 1907) 151 Fed. 626. In *Morrill v. American Reserve Co.* (C. C. A.; 1907) 151 Fed. 305, it was said that the circuit court of the Eastern District of Missouri and its receiver are without power to take possession of or administer the assets of the defendant companies in the Western District of the same state. But the question was not fully considered.

⁴ *Mercantile Trust Co. v. Kanawha & O. R. Co.* (1889) 39 Fed. 337.

⁵ *New York etc. R. Co. v. New York etc. R. Co.* (1893) 58 Fed. 279.

§ 2695. Who May File Bill for Ancillary Receiver.

The bill seeking the appointment of an ancillary receiver should be brought either by the party who filed the bill in the court of principal jurisdiction, and at whose instance the receiver was appointed, or by some other person who seeks affirmative relief. The original receiver himself is not a proper person to file a bill in the court of ancillary jurisdiction asking for the appointment of himself as receiver. He is merely the officer of the court of his original appointment, and he can show no grievance and can consequently make out no case for relief.⁶

§ 2696. Decree in Principal Suit as Affecting Proceedings in Ancillary Court.

In applications for an ancillary receivership upon bill filed in a court of ancillary jurisdiction, the decree of the court of primary jurisdiction is usually accepted as sufficient evidence that a proper case exists for the appointment of a receiver. For instance, it will be accepted as showing the insolvency of the corporation or other person over whose property a receiver has been appointed. But the court exercising ancillary jurisdiction must pass for itself on the question whether it is proper and necessary to appoint an ancillary receiver in its own jurisdiction.⁷

The propriety of the appointment of the receiver in the court of primary jurisdiction cannot be collaterally attacked in the ancillary proceedings by one not a party to the original suit.⁸

§ 2697. When Same Receiver Appointed as in Principal Cause.

The court in which ancillary proceedings are instituted will usually, as a matter of comity, appoint the same person to be receiver as was appointed by the court of principal jurisdiction.⁹ Especially is this desirable where the property involved in the receivership is a railroad, and it is necessary for the whole system to be operated under one responsible head. It is possible that circumstances might arise such as would justify and even require independent action in the appointment of receivers by the court of ancillary jurisdiction, but

⁶ *Greene v. Star Cash etc. Co.* (1900) 99 Fed. 656.

⁷ *Sands v. Greeley* (C. C. A.; 1898) 88 Fed. 132, 31 C. C. A. 424.

⁸ *Shinney v. North American Savings etc. Co.* (1899) 97 Fed. 9.

⁹ *Bay State Gas Co. v. Rogers* (1906) 147 Fed. 557; *Bayne v. Brewer Pottery Co.* (1897) 82 Fed. 391, 395; *Dillon v. Oregon S. L. etc. R. Co.* (1895) 66 Fed. 622.

the case would have to be a very unusual one. A court exercising ancillary jurisdiction should, so far as practicable, act with a due consideration for the court of primary jurisdiction.¹⁰

§ 2698. Sureties of Ancillary Receiver.

Upon appointing as ancillary receiver one who has already been appointed receiver in the court of principal jurisdiction, the ancillary court may accept as his sureties bondsmen who are residents of the state of original jurisdiction.¹¹

§ 2699. Orders of Ancillary Court as Conforming to Orders in Principal Court.

The decretal order of the court of ancillary jurisdiction usually expressly confers on the receiver the same power and authority given in the decretal order of the court of original jurisdiction;¹² and as a matter of comity, the court exercising ancillary jurisdiction will conform all its orders and decrees, so far as practicable, to those made in the court of primary jurisdiction. This is done to prevent the embarrassment that would result from the existence of inharmonious decrees in the different courts.¹³ But in following the course of the court of primary jurisdiction, the ancillary court will have due regard to any peculiar local conditions that may require a different disposition. The rule of comity must yield where substantial rights are at stake.¹⁴ In conducting a cause in an ancillary jurisdiction a receiver will be held bound by a condition imposed on him, in respect to the prosecution of such suit, by the court of principal jurisdiction.¹⁵

§ 2700. Distinct Characters of Principal and Ancillary Receiver.

The receiver appointed by the court of primary jurisdiction is a different legal person from the receiver appointed in the court of ancillary jurisdiction, and the circumstance that the same individual is appointed to both offices by the respective courts does not alter the case. This separate and distinct character of the receiver in his two different capacities not only holds in respect to judgments obtained for debts and in respect to the application of property in the hands of

¹⁰ *New York, P. & O. R. Co. v. New York etc. R. Co.* (1893) 58 Fed. 279. *Flour Milling Co.* (1901) 112 Fed. 371. See *Farmers' Loan etc. Co. v. Northern*

¹¹ *Taylor v. Life Ass'n of America* (1880) 3 Fed. 485. *Pac. R. Co.* (1896) 72 Fed. 26. ¹⁴ *Conklin v. U. S. Shipbuilding Co.*

¹² *Bay State Gas Co. v. Rogers* (1906) 147 Fed. 557. (1903) 123 Fed. 913. ¹⁵ *Wheeling etc. R. Co. v. Cochran*

¹³ *Central Trust Co. v. United States* (1898) 85 Fed. 500.

the receiver to the payment of debts, but also in respect to the management of the receivership property. It follows that if receivers who derive their authority from appointment by both courts commit a tort in one jurisdiction, they can be sued therefor only in their capacity of receiver as derived from that court and cannot be sued in their capacity of receiver as derived from the court of the other jurisdiction. But either court will entertain a suit against them for such tort, if they are sued in their proper capacity and valid service can be had.

Union Trust Co. v. Atchison etc. Co. (1898) 87 Fed. 530: Receivers appointed by a court in Kansas committed a tort there in the course of operating the railway. The plaintiff sued them in a Massachusetts court which had appointed them ancillary receivers over property of the same company situated in that district. It was held that as the tort was committed in Kansas, the receivers must be sued in their capacity as receivers under the decree of the Kansas court. But if service could be had, the suit would lie in the Massachusetts court.

§ 2701. In What Capacity Receiver Must Sue.

Where the same person is appointed receiver in a court of principal jurisdiction and also in a court of ancillary jurisdiction, he must, when suing in the latter court, sue in his capacity as ancillary receiver; and if this fact is not stated in the bill, it will yet be assumed, in order to support the suit, that he does sue as ancillary receiver and as an officer of the court of ancillary jurisdiction, and not as a foreign receiver.^{15a}

§ 2702. Receiver Must Act under Court Where Property Administered.

A person who is appointed receiver in a court of principal jurisdiction and is also appointed receiver of other property belonging to the same person or company in a court of ancillary jurisdiction must be careful not to presume upon the jurisdiction of the latter court by acting in such jurisdiction under orders given by the court of principal jurisdiction, for it may well happen that the court of ancillary jurisdiction will not so far respect the order of the court of principal jurisdiction as to give the receiver the benefit of it. Thus in a case where the court of principal jurisdiction had given the receiver authority to sell property at private sale, the receiver made such a sale in the jurisdiction of the ancillary court without having first obtained a ratification of this order from the latter court. This

^{15a} *Sullivan v. Sheehan* (1898) 89 Fed. 247.

court refused to approve of the sale and held the receiver personally liable for the loss thereby caused. In approving of the course thus pursued by the court of ancillary jurisdiction, Judge Taft, in the court of appeals, observed that it is a mistake to suppose that courts of ancillary jurisdiction are bound to make the same orders as the court of principal jurisdiction. "The whole relation of the two courts," said he, "is merely one of comity." And this comity must sometimes yield to more important considerations arising from local conditions.¹⁶

§ 2703. Disposition of Assets by Ancillary Court.

Though the proceeding in which an application is made for the appointment of a receiver in other jurisdictions than that of the original appointment is said to be ancillary, and though the receiver thus appointed is called an ancillary receiver, it is to be remembered that in appointing such a receiver the ancillary court exercises its own original jurisdiction. The receiver appointed by the ancillary court is its receiver and is completely amenable to its control. It matters not whether he is called an ancillary receiver or merely a receiver. His title to the assets within the jurisdiction is derived from the decree of the court appointing him, and it does not depend upon comity. The assets are thereby brought into the custody of the particular court, and are to be disposed of by it as equity and the orderly administration of justice require. Its judgments and decrees in respect to these assets must be accepted as conclusive by all other courts.¹⁷

§ 2704. Exclusiveness of Jurisdiction of Principal and Ancillary Courts.

Where receivership proceedings are instituted in a court of principal or primary jurisdiction and also in a court of ancillary jurisdiction, the two courts respectively exercise, with respect to each other, an exclusive jurisdiction over the property and subject-matter within their respective spheres. Each operates independently of the other. The decree in the court of primary jurisdiction is binding on the court of ancillary jurisdiction so far as relates to the administration of assets properly within the jurisdiction of the primary court, and the decree of the court of ancillary jurisdiction is binding on the primary court so far as relates to the administration of assets properly

¹⁶ *Kirker v. Owings* (C. C. A.; 1899) 98 Fed. 499, 39 C. C. A. 132.

¹⁷ *Sands v. Greeley* (C. C. A.; 1898) 88 Fed. 130, 31 C. C. A. 424.

within the jurisdiction of the court making the decree. Furthermore, it has been held, that even though a federal court of one state acquires jurisdiction, by a voluntary submission of the defendant, over the administration of assets in another state, the subsequent institution of proceedings in that other state whereby the property or estate in controversy is taken into possession by the courts of the latter, destroys the jurisdiction of the court that had already acquired jurisdiction by submission of the defendant. The moment proceedings are commenced and the assets are taken into the possession of the tribunal where they are situated, that moment the party whose estate is thus seized loses power to bind the estate in the court of the other state, either voluntarily or by submitting himself to the jurisdiction of the court.¹⁸

§ 2705. Proper Spheres of Respective Courts.

In settling receivership affairs in different jurisdictions and in passing the accounts of the receiver, the directions of the primary court will control in all matters pertaining to the general administration of the trust, and the directions of the court of ancillary jurisdiction will control in all matters of local administration. Thus the determination of local tax liens and the question as to what shall be done with personal property within the jurisdiction of the ancillary court and encumbered with a local lien are matters of local administration. Even in matters pertaining to local affairs the court of primary jurisdiction will sometimes feel justified in expressing an opinion, relying upon the local court to conform its proceedings therewith as a matter of comity if such course commends itself to the discretion of the local court.¹⁹ All motions relating to matters that have originated in the court of ancillary jurisdiction should be determined in that court.²⁰ General creditors should intervene by petition in the court of primary jurisdiction, and not in the court of ancillary jurisdiction.²¹

¹⁸ *Reynolds v. Stockton* (1891) 140 U. S. 254, 35 L. ed. 464, 11 Sup. Ct. 773, 211. The proceedings in the two different jurisdictions are entirely distinct, and the receiver in one jurisdiction has no right to interfere with the proceedings in the other court. *Johnson v. Southern Building etc. Ass'n* (1899) 99 Fed. 646, 649.

¹⁹ *Fletcher v. Harney Peak etc. Co.* (1897) 84 Fed. 555. See the order of the court assuming ancillary jurisdiction in *Baltimore etc. R. Co. v. Freeman* (C.

²⁰ *Jones v. Central Trust Co.* (C. C. A., 1896) 72 Fed. 563, 19 C. C. A. 509.

Where receiver's certificates had been issued by a court exercising ancillary jurisdiction, the court of principal jurisdiction left to the former court the matter of determining the amount of those certificates and ordering their final payment. *Doe v. Northwestern Coal etc. Co.* (1896) 72 Fed. 62.

²¹ *Central Trust Co. v. East Tennes-*

§ 2706. Accounting to Respective Courts.

Receivers who have been appointed such in a court of principal or primary jurisdiction and also in courts of ancillary jurisdiction should report and account to the former court in respect of all acts pertaining to their general management and administration of the trust.²² It is the duty of an ancillary receiver, under the orders of his court, to account with and remit to the receivers in the original jurisdiction all funds and assets in his hands.²³

§ 2707. Preference of Local Creditors in Ancillary Jurisdiction.

After a court appointing an ancillary receiver has gathered the assets within its jurisdiction, the question whether those assets shall be distributed for the satisfaction of local creditors by the court itself or whether they shall be transmitted to the court of primary jurisdiction for equal distribution to all creditors by that court depends on the nature of the claims held by the local creditors and also partly upon the discretion of the court having control of those assets. In this connection it may be noted that the federal courts are not governed by local considerations, but they attempt to treat all creditors alike regardless of their citizenship. Undoubtedly the federal courts are, for certain purposes, courts of the state wherein they sit, but in a larger sense they are courts of the whole country. The very circumstance that the federal courts have been given jurisdiction over controversies between citizens of different states is recognition of this broader notion of federal justice, and evinces a fear that the state courts may sometimes be inclined to protect their own citizens at the expense of citizens of other states. But if the states may be expected to be thus local and provincial, it is not so with the federal courts. Here the citizens of the different states are not to be treated as foreigners with respect to each other, and non-residence is not to be considered in weighing equities as between different litigants.²⁴

If local creditors have preferred claims that constitute a prior lien on the assets, it is everywhere recognized as proper that those claims should be first paid out of the assets gathered by the court of

see, *V. & G. R. Co.* (1886) 30 Fed. 895. ²² *Central R. & Banking Co. v. Farmers' Loan etc. Co.* (1902) 113 Fed. 405.
But see *Central Trust Co. v. East Tenn. etc. R. Co.* (1896) 69 Fed. 658. ²⁴ See Hammond, J. in *Taylor v. Life Asso.* (1880) 3 Fed. 465.
²³ *Ames v. Railroad Co.* (1894) 60 Fed. 966; *Central etc. Co. v. Farmers' etc. Co.* (1902) 113 Fed. 412.

ancillary jurisdiction. Indeed the whole system of ancillary receiverships has in a measure resulted from the recognition of the idea that assets should not be administered by a court of another jurisdiction until local claimants are satisfied. But if the local creditors are on the footing of general creditors and have no priority of lien, it is recognized as being within the discretion of the court, before satisfying those creditors, to transmit the assets to the court of primary jurisdiction to be there distributed *pro rata* to all creditors of the same class. This results in equality among creditors of the same class, and equality is equity. The federal courts make no distinction between foreign and domestic creditors when their claims are of equal validity.²⁵

Sands v. Greeley (C. C. A.; 1898) 88 Fed. 131, 31 C. C. A. 424: In a case where the circuit court of appeals approved the action of the lower court in transmitting assets gathered in New York to the court of primary jurisdiction in Connecticut for general distribution there, without first satisfying the claims of local creditors who had no priority of lien, it was insisted for the local creditors that the assets collected by the New York court were primarily subject to the claims of its citizens and should not be surrendered until those claims were satisfied.

The court observed that there are some expressions in the text-books, and even in the opinions of some of the courts, which sanction this contention, but that an examination of the cases would show that the broad proposition insisted upon had never been ruled. What has been actually decided is that the courts of one state will not recognize the title of a foreign receiver to the prejudice of its own citizens who have fairly acquired title to the assets either by purchase, attachment, or other legal process, or whose claims are entitled to priority as equitable liens.

§ 2708. Establishment of Claims in Ancillary Court.

An order of a court exercising ancillary jurisdiction in a receivership proceeding whereby it undertakes to draw and reserve to itself jurisdiction to settle and determine the claims and demands against the receiver held by citizens of the particular district, is effective to the extent that it authorizes the filing of intervening petitions in that cause by local creditors for the purpose of establishing their claims. But it will not justify an independent suit at law instituted against the receiver without service of process.²⁶

§ 2709. Order for Transmission of Assets to Court of Principal Jurisdiction.

The order for the transmission of assets to the domiciliary court, or court of principal jurisdiction, may be made by the court itself on

²⁵ *Smith v. Taggart* (C. C. A.; 1898) C. A.; 1901) 112 Fed. 237, 50 C. C. A. 87 Fed. 94, 30 C. C. A. 563.

²⁶ *Baltimore etc. Co. v. Freeman* (C.

its own motion or on the application of any party to the ancillary suit. Furthermore, the receiver appointed by the domiciliary court may file an intervening petition in the ancillary court asking that the fund to be distributed be turned over to him.²⁷

§ 2710. Protection of Local Creditors Having Claims against General Fund.

Where the assets collected by an ancillary receiver are transmitted under the order of his court to the court of primary jurisdiction for distribution among the general unsecured creditors, the court so transmitting these assets should see to it that the claims of the local creditors who are entitled to share in that general fund will be recognized and allowed by the court of primary jurisdiction and provision should be made for securing them equality in the general distribution. There is no hard and fast rule, however, to control the court in this respect. It will generally be enough for the ancillary court to adjudicate and determine the claims of local creditors so that they will not have to prove them again in the court of primary jurisdiction. No court exercising primary jurisdiction would presumably be guilty of bad faith in accepting assets from a court of ancillary jurisdiction and then discriminating in any way against the creditors whose claims have been allowed by the ancillary court.²⁸ In one case the ancillary court observed that it was to be presumed that the domiciliary court, or court of primary jurisdiction, would make such a distribution as ought to be made, and it consequently refused to require any pledge to be given, in regard to the method of distribution, as a condition precedent to the transmission of assets.²⁹

§ 2711. Effect of Discharge of Ancillary Receiver.

After an ancillary receiver has been discharged from further power and responsibility by the court that appointed him, a decree rendered against him as receiver is without effect. The circumstance that this loss of representative authority on his part has not been called to the attention of the court, does not strengthen the validity of the proceedings.³⁰

²⁷ *Smith v. Taggart* (C. C. A.; 1898) 87 Fed. 94, 30 C. C. A. 563. *Compare* ²⁸ *Smith v. Taggart* (C. C. A.; 1898) 87 Fed. 94, 30 C. C. A. 563.
²⁹ *Failley v. Talbee* (1893) 55 Fed. 892. ³⁰ *Reynolds v. Stockton* (1891) 140 U. S. 254, 35 L. ed. 464, 11 Sup. Ct. 773.
³¹ *Sands v. Greeley* (C. C. A.; 1898) 88 Fed. 133, 31 C. C. A. 424.

*Receiver's Accounting.***§ 2712. Duty of Receiver to Account.**

One of the most explicit duties of the receiver is that of rendering an account of his stewardship to the court of his appointment. This is required not only because the receiver is an officer of the court and because a formal accounting is necessary before the court can proceed to wind up the trust, but because it is desirable that all the parties in interest should from time to time be able to ascertain the facts pertaining to the administration of the receivership. The duty of the receiver to account is limited to the court of his appointment. This rule applies alike as between state and federal courts and between the different federal courts. An original bill will not lie in one court to compel an accounting by a receiver appointed by another court.³¹

§ 2713. Form and Details of Account.

The receiver's account should specify in detail the state of the property when he received it, and any changes that have since taken place. His receipts and disbursements should be set forth in schedule as specifically as possible.³² If a receiver who is part owner of the property held by him as receiver receives rent on the whole, he must duly account for such part of the rent as represents income from the property owned by the others.³³

§ 2714. Vouchers and Books Relating to Receivership.

As the receiver is bound to account to his court in respect to all his receipts and disbursements, he should always take pains to conduct his business in such way and according to such methods as will make it possible for him to present an intelligible statement. He should preserve vouchers of all his transactions, and if his business is at all complicated, he should have his books kept in such a way that a person skilled in bookkeeping can at any time ascertain the exact state of affairs. The penalty of failing to keep the affairs of the receivership in this way is that the receiver may be deprived of compensation.³⁴

³¹ *Conkling v. Butler* (1865) 4 Biss. 22, Fed. Cas. No. 3,100.

³² 3 Dan. Ch. Pr. 450.

³³ *In re Allen* (1881) 8 Fed. 753.

³⁴ *Braman v. Farmers' Loan etc. Co.* (C. C. A.; 1902) 51 C. C. A. 644, 114 Fed. 18, 22.

§ 2715. Intervals of Accounting.

According to the practice of the English chancery the receiver was required to account annually;³⁵ but in this country the period within which he should account is usually determined by an order of court made at the time of the appointment or later, or by local rule fixing the intervals at which the receiver's accounts should be rendered.³⁶

§ 2716. Order for Accounting.

If a receiver does not bring in his account within the time limited, a specific order can be obtained against him, at the instance of any interested party, requiring him to proceed with the accounting, and if he fails to do so upon such an order, he can be committed for contempt.³⁷ A delinquent receiver is also subject to be deprived of his compensation on account of his failure to account.³⁸

§ 2717. Special Master to Pass on Receiver's Accounts.

In the English chancery the receiver regularly accounted to the master. In the federal courts it would be an unobjectionable practice for the court itself to pass on the receiver's account and approve them where they are found correct; but inasmuch as the accounts of the receiver are often complicated and extensive, the usual practice is for the court to appoint a special master to take the receiver's accounts, unless there is already a standing master to whom the matter may be referred. A master so appointed exercises a somewhat different function from that exercised by a master who is appointed to report upon a matter referred to him for his own investigation, or who is authorized to take and state an account himself. In reporting on the receiver's account a master acts as a sort of vice-chancellor, and he fulfils a judicial rather than a ministerial function.³⁹

§ 2718. Notice of Receiver's Accounting.

All persons interested in the account should be notified of the time and place of hearing, whether it be before the court or before a

³⁵ 1 Smith, Ch. Pr. (2d ed.) 638.

³⁶ For rule of Circuit Court for Eastern District of Louisiana in regard to quarterly accounting of railroad receivers, see rule adopted by that court on June 21, 1895.

³⁷ By the practice of the English

chancery he was allowed four days within which to bring his account after an order to do so. 3 Dan. Ch. Pr. 450.

³⁸ 1 Smith, Ch. Pr. (2d ed.) 645.

³⁹ Cowdrey v. Railroad Co. (1870) 1 Woods 334.

master. But it is sufficient where notice is given to the solicitors of such interested parties.⁴⁰

§ 2719. Burden of Proof upon Receiver's Accounting.

In passing upon the accounts of a receiver the burden is on him to justify the account of his disbursements. To this end he should produce proper vouchers for money paid out by him. Even the pay roll should be vouched. But in a case where master had passed a pay roll account without proper vouchers or verification, the court did not disturb the account on that ground, and disposed of the cause on other points.⁴¹ A receiver whose accounts are lacking in detail will not be required to make a more satisfactory account and produce further vouchers, where the court can see that fraud is not imputable to him and the person insisting on a more detailed showing has been foreclosed of all interest in the fund.⁴²

§ 2720. General Principle Governing Allowance of Claims.

In passing on the accounts of a receiver and in determining what items should be allowed or disallowed reference should be had to the discretion conceded to the receiver in the administration of his trust as well as the extent of authority specially conferred on him by the court. In regard to railroad receivers it has been held that all outlays made by the receiver in good faith, in the ordinary course of business, and with a view to advance and promote the business of the road, and to render it profitable and successful, should be allowed. His duties and the discretion with which he is invested are very different from those of a passive receiver, appointed merely to collect and hold moneys due on prior transactions, or rents accruing from houses and lands. To such outlays in ordinary course may properly be referred not only the keeping of the road, buildings, and rolling stock, in repair, but also the providing of such additional accommodations and instrumentalities as the necessities of the business may require, always referring to the court for advice and authority in any matter of importance that may involve a considerable outlay of money.⁴³

⁴⁰ *Cowdrey v. Railroad Co.* (1870) 1 Woods 333, Fed. Cas. No. 3,293.

⁴¹ *Guttersen v. Lebanon Iron etc. Co.* (1907) 151 Fed. 72.

⁴² *Lafayette County v. Neely* (1884) 21 Fed. 738, 745.

⁴³ *Cowdrey v. Railroad Co.* (1870) 1 Woods 336, Fed. Cas. No. 3,293. In this case an item of expenditure was dis-

allowed which consisted of a charge for advertising the facilities and accommodations of the road in a local newspaper. The advertisement contained a favorable reference to a local firm as being proper persons to facilitate the forwarding of freight. The receiver was not in fact interested in the business of this firm, but his name was used in the firm style

Traveling expenses of a receiver incurred in going back and forth between his residence and the railway property over which he is receiver and also in traveling to other places in the interest of the property in his custody are properly allowed to him in final settlement.⁴⁴

§ 2721. No Allowance for Expenditures beyond Scope of Receiver's Authority.

A receiver will not be permitted to charge an expenditure incurred in respect to a matter not within the scope of his duty, though the money may have been expended with a view to protecting the property. Thus where a receiver had spent money in defeating a proposed municipal subsidy in aid of the construction of a railroad parallel with the one in his hands, the item was disallowed. The circumstance that the proposed road, if constructed, might have diminished the future earnings of the road in the hands of the receiver did not make it a part of the receiver's duty to oppose the building of the competitive line.⁴⁵ A receiver should not be allowed for payments made for office rent in a distant city where the lease was not sanctioned by the court. But if no exception is taken to the allowance of such a claim, the appellate court will not strike it out.⁴⁶

§ 2722. Expenditures in Part Beneficial to Trust.

Unnecessary expenses or expenses that are not incurred for the sole benefit of the trust should not as a whole be allowed to a receiver. But if it appears that a separable part of the claim represents a valid charge against the receivership, it may be allowed.⁴⁷

§ 2723. Expenses Incurred at Request of Parties Entitled.

Parties entitled to the proceeds of a receivership are estopped from questioning the right of the receiver to be reimbursed for expenses incurred at their request, even though such expenses are incurred in

with his consent. It was held that an advertisement whose object, in whole or in part, was the promotion of the interests of that firm should not be paid for out of the receivership funds. covering payments for goods lost in transportation and damage done to property while the road was in the hands of the receiver.

⁴⁴ Northern Alabama R. Co. v. Hopkins (C. C. A.; 1898) 87 Fed. 505, 31 C. C. A. 94. ⁴⁶ Braman v. Farmers' Loan etc. Co. (C. C. A.; 1902) 51 C. C. A. 644, 114 Fed. 21.

⁴⁵ Cowdrey v. Galveston etc. R. Co. (1876) 93 U. S. 352, 23 L. ed. 950. But in the same case, items were allowed ⁴⁷ Braman v. Farmers' Loan etc. Co. (C. C. A.; 1902) 51 C. C. A. 644, 114 Fed. 21.

connection with an enterprise that is, strictly speaking, outside the scope of the receiver's duties.⁴⁸

§ 2724. Money Embezzled by Subordinate.

The receiver cannot be allowed credit for money stolen or embezzled by his own clerk or employee. Having authority to employ assistance and being allowed proper sums for the compensation of the same, he becomes responsible for the wrongful acts done by his clerks, assistants, or employees.⁴⁹

§ 2725. When Losses Chargeable to Receiver—Mismanagement.

A receiver who by his mismanagement allows an asset belonging to the trust to pass into the hands of an irresponsible person whereby the assets in his hands are depleted, will, on settlement, be charged with the loss. But any property or security that he may have obtained for the lost assets will be allowed for.⁵⁰ If a receiver improvidently squanders the fund or disposes of the property without precedent authority and for an inadequate consideration he will be charged with its value. A failure fully to explain how diminution of the fund took place is sufficient to charge him with the loss.⁵¹ An instructive case as to the conditions under which managing receivers may be held personally liable as for mismanagement of their trust, on account of losses incurred in keeping the business going and for improper diversion of funds, is presented in the case next stated.

Gutterson v. Lebanon Iron etc. Co. (1907) 151 Fed. 72: A bill for a managing receivership of a steel plant was filed for the purpose rather of hindering lien creditors than for winding the business up. The answer of the company admitted the allegations of the bill and the receivers were appointed. The business ran sixty thousand dollars behind in eleven months. Meanwhile the receivers had paid out large sums of money on claims that did not represent a first lien on the property. These payments were made upon an order of the court, it is true, but in their application for the order the receivers had represented that they were in funds when in fact they were not. It was held that for these payments the receivers should be held personally liable. Had the real facts been stated the order to pay would not have been made. They were also held guilty of mismanagement of the business in not learning that the business was being conducted at a loss, when the same could have been easily ascertained.

⁴⁸ *Northern Alabama R. Co. v. Hopkins* (C. C. A.; 1898) 87 Fed. 505, 31 C. C. A. 94.

⁴⁹ *Gunn v. Ewan* (C. C. A.; 1899) 35 C. C. A. 213, 93 Fed. 80.

⁵⁰ *Morehead v. Striker* (1904) 123 Fed. 943.

⁵¹ *Kirker v. Owings* (C. C. A.; 1899)

§ 2726. Allowance of Proper Counsel Fees.

The receiver has implied authority when proper occasion arises to obtain legal counsel, and the reasonable fees of such counsel are among the items commonly allowed in settling the accounts of the master. The allowance of such fees is not made to the counsel directly but to the receiver. The counsel himself has no cause of action, but the allowance is to the receiver to enable him to give the necessary compensation to counsel.⁵³ The receivership fund is not chargeable with counsel fees for service rendered in an effort to deplete the fund, nor can a claim be allowed that is partly made up of such a charge. "The receiver should not pay counsel to work for their own interest against his as receiver, nor to work both ways."⁵⁴

A receiver will not be allowed an item for counsel fees where it appears that the expenditure was made for the maintenance of his individual rights as against the others represented by the receivership and not in the assertion of rights belonging to the receivership.⁵⁴

§ 2727. No Attorney Fee for Duties Devolving on Receiver.

Attorneys' fees will not be allowed to a receiver where there was no particular need for legal services and the duties performed by the attorney were such as devolved by law on the receiver himself. Thus one of the first duties of a receiver is to keep an account of his receipts and disbursements and to present to the court an orderly statement of these as well as a simple narrative of his acts as receiver. The making of such a report does not require technical legal skill, and hence if the receiver employs a lawyer to make up his report he is merely hiring another to do something he is legally bound to do himself. Therefore he will not be allowed any reimbursements for fees so paid away by him.⁵⁵

§ 2728. Counsel Fee of Intervening Petitioner.

An intervening petitioner in a receivership suit can have his counsel fees paid out of the fund only in rare cases, as, for instance, where it appears that the steps taken by him were absolutely necessary to

⁵³ *Cowdrey v. Galveston etc. R. Co.* (1871) 93 U. S. 352, 23 L. ed. 950; *Internal Improvement Fund v. Greenough* (1881) 105 U. S. 536, 26 L. ed. 1161; *Stuart v. Boulware* (1890) 133 U. S. 81, 33 L. ed. 561; *Elk Fork etc. Co. v. Foster* (C. C. A.; 1900) 39 C. C. A. 615, 99 Fed. 496. ⁵⁴ *Sowles v. Nat. Union Bank* (1897) 82 Fed. 139. ⁵⁵ *In re Allin* (1881) 8 Fed. 753. ⁵⁶ *Wilkinson v. Washington etc. Co.* (C. C. A.; 1900) 102 Fed. 28, 42 C. C. A. 140.

save the property for the benefit of all the creditors and that but for his efforts something would have been lost to the trust. The mere circumstance that he gives timely and important help is not enough. The general rule is that the client must pay his own solicitor.⁵⁶ This rule applies with full force where the intervening petitioner comes in to secure the enforcement of his own individual claim against the receiver. The fact that the intervener's claim is undisputed and that the receiver should have allowed it without question, does not put the intervener in a position to charge his expenses, other than the court costs and docket fee, to the receivership funds.⁵⁷

§ 2729. When Interest Chargeable to Receiver.

The receiver is liable for interest where he fails to pay over sums coming to his hands that ought to be turned over to the party entitled thereto. The circumstance that leave of the court is necessary before such a fund could properly be turned over is no defense, if the receiver negligently takes no steps to call the attention of the court to the exact situation in order to get proper leave. The receiver is also liable for interest on any fund held by him on which he could, by proper management, have collected interest.⁵⁸ Interest should also be charged where the receiver keeps the trust fund deposited in a bank to his own private account, and no satisfactory explanation is forthcoming from him.⁵⁹

A receiver who unduly withholds a fund from the beneficiaries while he is litigating for an excessive compensation will not only be charged interest but a further penalty of ten per cent. as damages for the delay caused by his appeal.⁶⁰

§ 2730. Submission of Draft Report.

Where the matter of passing on the receiver's accounts is referred to a master, the latter, after preparing his report, should submit a draft of the same to the parties in the cause, in order that any defects or errors in it may be pointed out and that objections or exceptions may be filed while the report is still in the hands of the receiver.⁶¹

⁵⁶ *Weed v. Central etc. R. Co.* (C. C. A.: 1900) 40 C. C. A. 319, 100 Fed. 162. ⁵⁹ *Wilkinson v. Washington Trust Co.* (C. C. A.: 1900) 42 C. C. A. 141, 102

⁵⁷ *Central Trust Co. v. Valley R. Co.* Fed. 28. (1893) 55 Fed. 903.

⁵⁸ *Rosenthal v. McGraw* (C. C. A.: 1905) 71 C. C. A. 277, 138 Fed. 721.

⁵⁹ *Hinckley v. Gilman etc. R. Co.* (1879) 100 U. S. 157, 25 L. ed. 593.

⁶¹ *Cowdrey v. Railroad Co.* (1870) 1 Woods 333, Fed. Cas. No. 3,293. The reader will remember that in some circuits it is not necessary first to take exceptions before the master. They can

§ 2731. Mode of Reviewing Master's Report on Receiver's Account.

There is an old rule of practice, formerly recognized in the English chancery, to the effect that exceptions, in the technical sense, do not lie to the master's report on a receiver's account. The proper remedy, so it was considered, is by petition to rehear or motion to reconsider (while the report is yet in the master's hands) and by petition to review or recommit (when the report is before the court). The same rule was applied in regard to the master's report on a receiver's account as was applied to the master's report in the matter of the taxation of costs. Such reports were not subject to exception, but were subject to review upon petition. However, on petition the court would not consider objections to the particular items of the account, but only objections to the general principle adopted by the master in passing on the account.⁶²

The idea underlying this practice is that a master, in acting on the accounts of a receiver, exercises a judicial discretion, and it is a rule that a master's report on matters of discretion is not subject to exception, but is only subject to review in a proper case.⁶³ Furthermore it may be noted that the receiver whose accounts are to be passed on is himself an officer of the court as well as the master, and the receiver states his own accounts, and submits them to the master as a sort of vice-chancellor. Such an account is not stated by the master as an ordinary account taken before him is supposed to be, but is stated by the receiver and judicially passed on by the master.

§ 2732. Federal Practice as to Reviewing Master's Report.

The distinction here noted between the procedure for the correction of errors in a master's report on a receiver's account and that for the correction of errors in ordinary reports of the master has been casually approved in the federal courts in at least one case;⁶⁴ but the distinction is quite technical, and we have doubts as to its value, and even as to its soundness, as applied to the practice in federal courts. It should be borne in mind that the master, in the English court of chancery, was a well known functionary, and his office formed one of the well known branches of the court. In the federal courts masters are usually appointed upon any special occasion requiring the services of a master, and standing masters are uncommon. It

be taken in the first instance before the court, in accordance with Equity Rule 83. See *ante*, p. 869, § 1484.

⁶² *Shewell v. Jones* (1824) 2 Sim. & Sta. 170; 2 Smith, Ch. Pr. (2d ed.) 388. Eq. Prac. Vol. —99.

⁶³ 2 Smith, Ch. Pr. (2d ed.) 383.

⁶⁴ *Cowdrey v. Railroad Co.* (1870) 1 Woods 334, Fed. Cas. No. 3,293.

therefore seems unnecessary to concede to the report of one of our masters the same force and effect that was attributed to the report of a master in the English chancery. From the principle that the master in passing upon a receiver's account acts in a judicial capacity, the English courts derived a rule to the effect that the report of a master on a receiver's account does not require an order of court to confirm it.⁶⁵ We have not seen any suggestion in the decisions of the federal courts recognizing this principle, and undoubtedly in our practice such a report must be approved and confirmed by the court;⁶⁶ and therefore it should be held that it is subject to exceptions the same as other ordinary reports.

§ 2733. Scope of Court's Review.

As the master's report on the receiver's accounts often involves a vast multitude of items that are referable to a few distinct heads, the court will, as a rule, in considering the master's report, confine itself to a consideration of the principle on which the receiver has acted in passing on the various classes of items. If the master appears to have adopted an erroneous principle in allowing an account, the court will either correct the error itself or refer the matter back to the master, with instructions, in order that the items may be corrected by him. It would often be tedious and impracticable for the court to undertake to pass on all the items in detail.⁶⁷

§ 2734. Reopening Account.

Where a receiver's account has been passed upon by the master and confirmed by the court it is not subject to be reopened except upon a direct proceeding showing special reason why the report should be re-examined, such as error, fraud, mistake, or the like. Where there are several receivers some of whom have accounted while others have not, an order of the court that the receivers shall account before the master will be understood as referring to such of them as have not already accounted. Such an order does not authorize the reopening of the account of a master that has already been passed upon and confirmed.⁶⁸

⁶⁵ 2 Smith, Ch. Pr. (2d ed.) 357, 358; *ards v. Morris Capal etc. Co.* (1844) 4 Shewell v. Jones (1824) 2 Sim. & Stu. N. J. Eq. 428.
170.

⁶⁶ In New Jersey it has been expressly held that a master's report on a receiver's account must be confirmed, and the English practice is not followed. Rich-

⁶⁷ *Cowdrey v. Railroad Co.* (1876) 1 Woods 331, 334, Fed. Cas. No. 3,293.

⁶⁸ *Farmers' Loan & Trust Co. v. Central Railroad of Iowa* (1890) 1 McCrary 352.

§ 2735. Order on Receiver to Pay Debt.

A court may commit its receiver for contempt in failing to obey its order in respect to the payment of debts incurred by him as receiver. The circumstance that he has no funds does not excuse him where the court has found that the want of funds is attributable to his improvidence or neglect in office, and has made the order requiring him to pay the debts out of his own funds in view of that circumstance.⁶⁹

⁶⁹ *Kirker v. Owings* (C. C. A.; 1899) 39 C. C. A. 132, 98 Fed. 499, 512.

CHAPTER LXVI.

RECEIVERS (*continued*).

Preferential Claims.

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Preferential Claims.

a. Charges Created or Arising Pending Receivership Proceedings.

§ 2736. Final Distribution of Receivership Fund.

When the receivership proceedings reach their final stage, that is when all the property has been converted into a fund available for distribution, and all the parties interested in the same have been brought before the court upon due references to the master and upon such interventions as may be deemed necessary, and the cause is ready for final disposition, it then becomes necessary for the court to consider and adjust the rights of all the claimants, giving preference to such as may be entitled thereto and distributing any balance equitably among the creditors who are not secured. This problem is often beset with much difficulty, and questions of the greatest delicacy arise in connection with it. This is particularly true of railroad receiverships, where the claimants of the fund are nearly always numerous, and the claims vary in character from those presenting the strongest legal and equitable title to those devoid of all legal claim and possessing only the slightest equity, if any at all, entitling them to preference. To deal minutely with all the various considerations that operate upon courts of equity in determining the relative merit of the many claims that are presented in these causes is not within the proper scope of this treatise; and indeed to undertake to work this subject out in all its ramifications, even from the decisions of the federal courts alone, would apparently require a volume in itself; nor would the results repay for the labor expended. All that will be here attempted is to give an idea of the principle upon which the courts proceed and in a general way to indicate the present drift of judicial opinion, as expressed in the decisions of our higher courts. The chief point of controversy is in connection with the question whether particular unsecured claims can be given preference over debts secured by mortgage or other lien.

§ 2737. Costs and Expenses—Counsel Fee.

The costs and necessary expenses of the receivership are of course chargeable to the funds in the hands of the receiver and are to be paid even before the lienholder or mortgagee can be permitted to share.

The expenses of the receivership are burdens on the property irrespective of the rights of any of the parties and irrespective of any prior liens affected by the proceedings.¹ Whatever can be allowed as part of the taxable costs in any case is entitled to prior payment. It is a general rule that any reasonable expense incurred by the receiver in the care, protection, and control of the property will be allowed as a proper charge; but the receiver is not authorized, without the previous direction of the court, to incur expenses on account of the property in his hands beyond what is essential to its preservation and use, as contemplated by his appointment. In applying this rule due regard must be had not only to the nature and surroundings of the property, but to the exigencies of the moment when the receiver is required to take action involving the safety and proper use of the property.²

Compensation for the services of the attorney or counsel employed by the receiver can be taxed as costs in the cause.³ But as a general rule lawyers' fees for services rendered to the corporation prior to the appointment of a receiver are not entitled to priority, for they are not an expense of the receivership.⁴

§ 2738. Payment of Taxes.

Claims for taxes due on the property are also entitled to share in the proceeds, and they have precedence over the claims of mortgagees.⁵ The receiver should pay all just and lawful taxes assessed against the property in his hands. This he may do without having obtained the previous sanction of the court. The accounts for such payments will usually be passed without question. On the other hand, if the receiver considers a tax to be unlawful and the claim therefor to be unjust, he should not pay it, unless, upon taking the advice of the court, the tax is adjudged to be valid and he is ordered to pay it. It is the receiver's duty to ask for the instruction of the court in every doubtful case. If a controversy arises between the receiver and the taxing authorities, and the receiver refuses to pay a particular

¹ *Pennsylvania Ins. Co. v. Jacksonville etc. R. Co.* (C. C. A.; 1895) 66 Fed. 421, 13 C. C. A. 550. *Finance Co. v. Charleston etc. R. Co.* (1892) 52 Fed. 526.

² *Cowdrey v. Galveston etc. R. Co.* (1877) 93 U. S. 352, 23 L. ed. 950. ⁵ *U. S. Trust Co. v. Mercantile Trust Co.* (C. C. A.; 1898) 88 Fed. 140, 31 C. C. A. 427; *Mercantile Trust Co. v. Atlantic etc. R. Co.* (1897) 80 Fed. 18.

³ *Petersburg Sav. etc. Co. v. Dellatorre* (C. C. A.; 1895) 70 Fed. 643, 17 C. C. A. 310 (compensation of receiver and his solicitors allowed as costs and given priority.) *Clyde v. Richmond etc. R. Co.* (1894) 63 Fed. 21; *Central Trust Co. v. Wash etc. R. Co.* (1896) 26 Fed. 11; *Georgia v. Atlantic etc. R. Co.* (1879) 3 Woods 434.

⁴ *Louisville etc. R. Co. v. Wilson* (1891) 138 U. S. 501, 34 L. ed. 1023;

tax, whereupon the tax officer levies or distrains the property held by the receiver or otherwise interferes with his possession, he may appeal to the court for protection, and if the tax is found invalid, the tax officer will be enjoined.⁶

The receiver is relieved from the burden of paying where the property is sold subject to the tax lien and the taxes are paid by the purchaser.⁷

§ 2739. Receiver's Petition for Relief against Taxes.

A receiver's petition for relief against taxes will not be entertained where the only ground stated is that it is not convenient for him to pay the tax.⁸ Nor will he be granted relief where the tax is found to be legal. The receiver must pay all just and lawful taxes, and the court will not interfere to protect him if he attempts to escape from such payment.⁹ In a case where a receiver sought to enjoin a sale for taxes, the court found that the tax was valid. However, it enjoined the sale as requested by the receiver and ordered that the receiver pay the tax either from funds in his hands, or, failing such, from funds to be derived from sales of the property made by himself.¹⁰

§ 2740. Operating Expenses in Case of Managing Receivership.

Where a receiver is charged with a duty of manager and is required to continue to operate the enterprise or business committed to his care, any expense necessarily and properly incurred as an incident to the continuance and operation of the business constitutes a first lien on the property and funds irrespective of the lien of mortgages or other incumbrances. Such charges are really a part of the cost of the receivership and are chargeable to the fund without regard to the rights of any of the parties.¹¹

⁶ *Georgia v. Atlantic etc. R. Co.* (1879) 3 Woods 437; *Ex p. Chamberlain* (1893) 55 Fed. 704.

⁷ *Wheeler v. Walton & Whann Co.* (1895) 65 Fed. 720.

⁸ *Central Trust Co. v. Wabash etc. R. Co.* (1885) 26 Fed. 3.

⁹ *Stevens v. Railroad Co.* (1875) 13 Blatchf. 104.

¹⁰ *Ledoux v. La Bee* (1897) 83 Fed. 761.

¹¹ *Virginia etc. Coal Co. v. Cent. R. etc. Co.* (1898) 170 U. S. 355, 42 L. ed. 1068; *Illinois Trust etc. Bank v. Doud* (C. C. A.; 1900) 105 Fed. 123, 52 L.R.A. 481, 44 C. C. A. 389; *Central Trust Co.*

v. Clark (C. C. A.; 1897) 81 Fed. 269, 26 C. C. A. 397; *Southern R. Co. v. Carnegie Steel Co.* (C. C. A.; 1896) 76 Fed. 492, 22 C. C. A. 289; *Clark v. Cent. R. & B. Co.* (C. C. A.; 1895) 66 Fed. 803, 14 C. C. A. 112; *Ruhlender v. Chesapeake etc. R. Co.* (C. C. A.; 1898) 91 Fed. 5, 33 C. C. A. 299; *Farmers' Loan etc. Co. v. Green Bay etc. R. Co.* (1891) 45 Fed. 664; *Turner v. Indianapolis etc. R. Co.* (1878) 8 Biss. 315.

While not technically costs, operating expenses may be construed as being within the meaning of the words "costs of suit" as used in a decree adjudicating the order in which the proceeds of a

§ 2741. What Are Necessary Operating Expenses.

Though the general rule that operating expenses are entitled to preference is well settled, it will be found that there is diversity of opinion as to the nature of the items that may properly be brought within this category. The wages of laborers employed in conducting a business in the hands of a receiver are emphatically a claim that is entitled to priority under this head.¹² It has been held that bills incurred in advertising the facilities of a road, such as its train service and other accommodations, are necessary operating expenditures and chargeable as such.¹³ If a receiver is authorized by the court to incur debts for supplies to a limited amount only, creditors at large who advance him supplies in excess of that amount must be considered bound by this limitation, and the court will not allow the claims for such excess as against other claims resting on a better footing.¹⁴

§ 2742. When Claim for Damages Allowed Priority.

Damages for injury to person or property incurred during the receivership and occasioned by the torts of the receiver, his agents, or servants, are classed as operating expenses and are accordingly allowed priority. These claims will be paid out of the net income, if sufficient, but in case of deficiency they may be charged to the corpus.¹⁵

sale should be applied. *Farmers' Loan etc. Co. v. Stuttgart etc. Co.* (1901) 106 Fed. 565. In *Meyer v. Johnston* (1875) 53 Ala. 237, 354, the chancellor adjudged that "the costs to be taxed in this cause, including the costs, commissions, and expenses of the sales, the expenses incurred and to be incurred by the receivers in operating said railroad and in the performance of their duties as such receivers, shall be a charge upon the gross proceeds of the sale of all the property herein authorized to be sold, and the balance shall be divided and distributed to the several classes of creditors in the order and to the extent of the respective liens and priorities as ascertained and established under this decree." The principle of the decree was approved by the supreme court, though the incidence of the costs was modified as to some of the parties.

¹² *In re Erie Lumber Co.* (1906) 150 Fed. 823, 824.

¹³ *Queen Anne's Ferry etc. Co. v.*

Queen Anne's R. Co. (1906) 148 Fed. 41. But see *Central Trust Co. v. East Tenn. etc. R. Co.* (C. C. A.; 1897) 80 Fed. 624, 26 C. C. A. 30.

¹⁴ *In re Erie Lumber Co.* (1906) 150 Fed. 830.

¹⁵ *Central Trust Co. v. Denver etc. R. Co.* (C. C. A.; 1899) 97 Fed. 239, 38 C. C. A. 143; *Anderson v. Condict* (C. C. A.; 1899) 93 Fed. 349, 35 C. C. A. 335; *Cross v. Evans* (C. C. A.; 1898) 86 Fed. 1, 29 C. C. A. 523; *St. Louis etc. R. Co. v. Holbrook* (C. C. A.; 1896) 73 Fed. 112, 19 C. C. A. 385; *Rouse v. Hornsby* (C. C. A.; 1895) 67 Fed. 219, 14 C. C. A. 377.

But claims for damages resulting from torts committed prior to the receivership cannot be considered as operating expenses arising under the receivership and hence they are not entitled to priority. *Northern Pacific R. Co. v. Heflin* (C. C. A.; 1897) 83 Fed. 93, 27 C. C. A. 460; *Front Street Cable R. Co. v. Drake* (1897) 84 Fed. 257; *Farmers'*

§ 2743. When Claims May Be Paid.

In railroad foreclosure proceedings it is permissible to instruct the master to pay out of the proceeds of the sale claims incurred by the receiver for operating expenses and other preferential claims without waiting for the final audit of the accounts of the master.¹⁶

By approving a claim for expenditures made by a receiver the court thereby ratifies the conduct of the receiver in respect to that matter, and such ratification is equivalent to prior authority from the court.¹⁷

§ 2744. Creation of Preference in Favor of Claim for Betterments.

The power of the court of equity to make a charge a first lien on the assets extends not only to such expenses as are absolutely necessary for the maintenance of the road as a going concern, but it also extends to charges incurred in the making of the betterments and permanent improvements. Before such a charge can be given a preference, it is necessary that the court should have authorized it beforehand and that the charge should have been incurred upon the faith of the court's promise that it should be a preferred claim. To say that the court of equity has the power to create such charges does not necessarily import that it will always do so; and in fact, though the power has been exercised in a few cases, the tendency of the later cases is decidedly against it, except where the permanent improvement or betterment is absolutely necessary to enable the road to be successfully operated. Perhaps the most radical exercise of the power to create preferences in favor of charges incurred for betterments is found in cases where the courts have authorized the receiver to incur debts for the purpose of completing a railroad or portions of it.¹⁸ This power of postponing existing liens to liens created by the court for the purpose of completing an unfinished railroad has rarely been exercised, and ought not to be exerted unless it can be done without ultimate loss to the existing lienholders. It is to be exercised with great caution, and, if

Loan etc. R. Co. v. Northern Pacific R. Co. (C. C. A.; 1897) 79 Fed. 227, 24 162 U. S. 544, 40 L. ed. 1068.

C. C. A. 511; *Farmers' Loan etc. Co. v. Nestelle* (C. C. A.; 1897) 79 Fed. 748, U. S. 146, 24 L. ed. 895; *Miltnerberger v. 25 C. C. A. 194*; *St. Louis Trust Co. v. Logansport etc. R. Co.* (1882) 106 U. S. Riley (C. C. A.; 1895) 70 Fed. 32, 30 286, 27 L. ed. 117; *First Nat. Bank v. L.R.A. 456*, 16 C. C. A. 610; *Atchison Ewing* (C. C. A.; 1900) 103 Fed. 168, etc. R. Co. v. Osborn (1906) 148 Fed. 183, 43 C. C. A. 150.

606, 610, 78 C. C. A. 378.

¹⁶ *Miltnerberger v. Logansport etc. R. Co.* (1882) 106 U. S. 309, 27 L. ed. 126.

¹⁷ *Girard Ins. Co. v. Cooper* (1895)

¹⁸ See *Wallace v. Loomis* (1877) 97

not reduced to writing or made sufficiently clear to justify the enforcement of specific performance.²⁵

b. Charges Created or Arising Prior to Receivership.

§ 2747. Power of Court to Prefer Debts Incurred Prior to Receivership.

The most difficult of all the problems connected with the adjustment of priorities is that which arises in connection with unsecured claims, open accounts, and other obligations existing at the time of the appointment of the receiver. The general principle of course is that such claims are not entitled to preference over the prior mortgage debt or other lien. Having come into existence prior to the institution of the receivership, such claims cannot be considered in any sense to be part of the operating expenses incurred under the receivership, and hence the owner of such a claim is, generally speaking, entitled to share only in such of the fund as may be left after the secured debts are paid.

But notwithstanding this general rule, it is well established that a court of equity has the power, in certain classes of receiverships, to create a priority in favor of back debts incurred within a limited and reasonable time prior to the receivership. The exception is almost exclusively confined to receiverships established over railroads and other corporations charged with the performance of public service; and it is limited strictly to claims for expenses of operation prior to the appointment of the receiver and chargeable to the current account. Such priority will commonly be allowed only where the failure to do so would cause misadjustment in the existing business arrangements of the road and interfere with the proper management of the property.

§ 2748. Basis of Power to Prefer Back Debts.

The ground upon which the court of equity presumes to give an unsecured obligation priority over a mortgage or other lien can perhaps be truly indicated as follows: The creation of a receivership involves an exercise of unusual and extraordinary power. A person who has a first lien or mortgage upon any property or business is not bound to ask for a receivership as an incident to the foreclosure of his lien or as an incident to the enforcement of any other legal or equitable right. All the rights of such person, as they exist under the contract, can usually be enforced in a simple foreclosure suit or other

²⁵ *Bibber-White Co. v. White River etc. Co.* (1901) 110 Fed. 472.

proceeding; and there is no necessity as a matter of law, or even as a matter of strict justice, that the property should be taken from the mortgagor or other person in possession, during the pendency of the suit. But it is obvious that it may often be to the financial interest of the creditor, or of others, that the court should take the property in its own hands and manage it. This will often increase the revenue and in the end produce more than would otherwise be gotten out of the property. But this chance of bettering the financial results is dependent solely on the exercise of equitable discretion. Therefore it is considered that when the court of equity undertakes to appoint a managing receiver for the purpose of increasing the fund for final distribution, it has ample power to impose such terms as seems honest and fair to it. Furthermore, it must be remembered that public corporations are charged with the performance of public duties, and upon assuming the management of them the court of equity will see to it that those public duties are performed. All creditors, however high the nature of their security may be, hold subject to the performance of such obligations to the public, and cannot expect their mortgage or lien to be paid until the public duties have been performed. It follows that a court of equity, in giving priority to unsecured claims incurred prior to the receivership, as an incident to the performance of the public duties of the corporation, cannot be accused of abusing or seriously violating the legal rights or equities of the secured creditor.²⁶

§ 2749. Origin and Development of Doctrine.

The nature of the equitable power to give priority to certain claims created prior to the receivership and the conditions under which this power may be rightly exercised have been the subject of extensive consideration in the federal courts, and the decisions are not by any means in harmony. The doctrine may be denominated a novel one, since it belongs to a period of hardly more than thirty years. The decisions of the supreme court prior to that period afford no traces of the doctrine, as will appear from the following decision.

Galveston etc. R. Co. v. Cowdrey (1870) 11 Wall. 459, 20 L. ed. 199: This case antedates the appearance of the doctrine in question and it is decided in conformity with the general principle formerly considered applicable in such cases, namely, that a person secured by a mortgage on a road, its rolling stock, fixtures, and income, has a superior lien on all the additions to the road and its appurtenances,

²⁶*Fordick v. Schall* (1878) 99 U. S. 235, 251, 25 L. ed. 339, 342; *Hale v. Frost* (1878) 99 U. S. 389, 25 L. ed. 419,

such lien not being subject to be displaced by a claim subsequently accruing for supplies or betterment. One of the claimants in this case had supplied iron for rails on a portion of the road. He insisted this claim should be allowed priority. But the contention was overruled. The court observed that the rails had become a part of the road, and that by allowing his property to go into or become a part of the road, the claimant had consented for it to be covered by the mortgage, and that he acquired no lien that could displace that of the mortgagee. The principle of maritime law by which the last creditor who furnishes necessary supplies to a vessel has priority is not applicable, so the court said, to cases where materials are supplied to a railroad. The common law controls in these cases.

Beginning in the seventies a strong line of cases evinced a liberal tendency in favor of allowing priority to certain unsecured claims for past debts. The way was prepared for this step by a recognition of the very extensive power of the court to create preferences in favor of debts incurred in the use, preservation, and improvement of the railroad system while in the hands of the receiver. The following cases illustrate the beginnings of the doctrine. It will be noted that the question of the power of the court to create preferences is frequently discussed in connection with the right to issue receiver's certificates that shall constitute a first lien. When it had become fully established that the court had power to authorize the issuance of certificates for the purpose of raising money, it was found not to be easy to control the court as regards the purposes for which the money so raised might be expended. The equity in favor of past due debts doubtless owes its recognition largely to this circumstance.

1. *Meyer v. Johnston* (1875) 53 Ala. 237: This is a leading American authority on the question of the power of a court of chancery to issue certificates and create a charge on property in the hands of a receiver that will override a prior mortgage or other lien. The situation was one where it was necessary, or at least highly desirable, that money should be raised for the purpose of preserving the property, procuring equipment, and to keep the railroad in operation as a going concern. It was held that the power in question undoubtedly existed. It was admitted that the railroad itself could not by contract create a charge that would override a prior lien; but it was said that a court of equity, having the property in custody, could allow a debt to be created for the preservation or necessary improvement of the property and refuse to allow the property to pass out of its power until the obligation should be discharged. Among other things the court said: "It seems necessarily to result from the nature of such property, and the capacity and duty of courts of equity to adapt their decrees to all varieties of circumstances which can arise and adjust them to all the peculiar rights of all parties in interest, that if a railroad and its appurtenances are in the hands of a receiver to be preserved and operated, the court having charge thereof must possess the power, after the notice to and hearing of the parties interested, to allow the issue even of negotiable certificates of indebtedness creating a first lien, when this is necessary to raise money for the economical management and the conser-

vation of the property, until it shall be disposed of. The pressure upon the courts in various portions of the country, to exercise such authority, and the consent or acquiescence of first mortgagees and others in the exercise of it, are persuasive that the power must exist." ²⁷

2. *Wallace v. Loomis* (1877) 97 U. S. 146, 24 L. ed. 895: In a suit for the foreclosure of the first mortgage on a railroad, to which the trustees of a second mortgage were parties, the court, with the consent of the parties, appointed receivers, with power to put the road in repair and operate it, and complete any unfinished portions, and procure rolling-stock, and for these purposes to raise money by loan to an amount named in the order, and to issue certificates of indebtedness therefor, which should be a first lien on the property, payable before the first mortgage bonds. The final decree declared that the moneys raised by loan, or advanced by the receivers, and expended on the road, pursuant to their order of appointment, were a lien paramount to the first mortgage, and it directed them and such receivers' certificates or other indebtedness as might thereafter be ordered by the court to be paid, to be paid out of the proceeds of the sale of the road before paying any of the first-mortgage bonds or coupons.

On appeal to the supreme court the decree was sustained. Said Mr. Justice Bradley: "The power of a court of equity to appoint managing receivers of such property as a railroad, when taken under its charge as a trust fund for the payment of incumbrances, and to authorize such receivers to raise money necessary for the preservation and management of the property, and make the same chargeable as a lien thereon for its repayment, cannot, at this day, be seriously disputed. It is a part of that jurisdiction, always exercised by the court, by which it is its duty to protect and preserve the trust funds in its hands. It is, undoubtedly, a power to be exercised with great caution; and, if possible, with the consent or acquiescence of the parties interested in the fund."

The right of the court to issue certificates and to create a preference in favor of debts contracted with a view to the preservation, use, and improvement of the property while in the custody of the receiver having been established, it was naturally only a little while until the court should be urged to allow priority to debts created prior to the receivership in the course of ordinary business and as a part of the operating expenses. The strong equity presented by some of these claims lent weight to the argument, and accordingly the right was presently recognized, at least so far as the income during the receivership would go to satisfy such claims.

1. *Fosdick v. Schall* (1878) 99 U. S. 235, 25 L. ed. 339: A dictum of this case recognizes the power of the court of equity to devote the income during the receivership to the payment of outstanding debts, existing at the time of the appointment of the receiver, "for labor, supplies, equipment, or permanent improvement of the mortgaged property." It was said that the appointment of a receiver is not a matter of strict right, but is dependent on the exercise of sound

judicial discretion. Consequently the court may, as a condition of issuing the necessary order, impose such terms in reference to the payment of back debts from the earnings as may appear reasonable. In the same case the court recognized the propriety of applying the proceeds of the corpus to the payment of such debt where there has been a diversion of funds from the current income to the payment of interest or the making of valuable improvements.

But the point actually decided in the case was merely this, that a creditor who had sold cars to the railroad two years prior to the receivership was not entitled to preference, the cars having been reclaimed by the seller under a right of reclamation and reasonable rental having been paid for the use of the cars while they were used by the receiver.

2. *Miltenberger v. Logansport etc. R. Co.* (1882) 106 U. S. 286, 27 L. ed. 117: In this case the doctrine appears full-fledged. The second mortgagee of a railroad procured the appointment of a receiver in a foreclosure suit to which the first mortgagee was made a party. Upon appointing the receiver the court saw fit to authorize him to pay operating expenses incurred in the three months preceding. A later order authorized him to pay indebtedness to other connecting lines in settlement of ticket and freight accounts and balances and for materials and repairs which indebtedness had in part arisen several months before the appointment of the receiver. He was also authorized to purchase new rolling-stock and to construct a piece of road forming a necessary connecting link between the different parts of his road. All these charges and disbursements were made a first lien on the road, and were afterwards paid by the master under the orders of the court in preference to the claims of the first mortgagee. All this was upheld as legitimate and proper. Said the supreme court: "It cannot be affirmed that no items which accrued before the appointment of a receiver can be allowed in any case. Many circumstances may exist which may make it necessary and indispensable to the business of the road and the preservation of the property, for the receiver to pay pre-existing debts of certain classes, out of the earnings of the receivership, or even the corpus of the property, under the order of the court, with a priority of lien. Yet the discretion to do so should be exercised with very great care. The payment of such debts stands, *prima facie*, on a different basis from the payment of claims arising under the receivership, while it may be brought within the principle of the latter by special circumstances. It is easy to see that the payment of unpaid debts for operating expenses, accrued within ninety days, due by a railroad company suddenly deprived of the control of its property, due to operatives in its employ, whose cessation from work simultaneously is to be deprecated, in the interests both of the property and of the public, and the payment of limited amounts due to other and connecting lines of road for materials and repairs and for unpaid ticket and freight balances, the outcome of indispensable business relations, where a stoppage of the continuance of such business relations would be a probable result, in case of non-payment, the general consequence involving largely, also, the interests and accommodation of travel and traffic, may well place such payments in the category of payments to preserve the mortgaged property in a large sense, by maintaining the good-will and integrity of the enterprise, and entitle them to be made a first lien."

3. *Union Trust Co. v. Illinois Midland R. Co.* (1885) 117 U. S. 434, 29 L. ed. 963: In this case many different series of certificates had been issued for various purposes by the successive receivers who had been in charge of a railroad, viz., for such purposes as the payment of tax liens, for necessary repairs of the road,

to replace earnings diverted from operating expenses and from the repair account, to pay wages due employees, and to pay debts incurred in ordinary course of business and due to other roads; also to pay wages incurred in the six months previous to the appointment of the receiver. It was held that all these were valid charges and could be given priority as against the corpus of the property where the income was inadequate.

But in the same case the court refused to allow priority in favor of sums of money borrowed by the receiver without the authority of the court, although the money was used for legitimate purposes, such as are indicated in the preceding paragraph. It was observed that there is never any difficulty in obtaining an order of the court, where one is proper, to borrow money for specific purposes and in a specified total amount. In any event, an item for money borrowed by the receiver will not be allowed priority if the purpose for which the money was used is not shown.²⁸

§ 2780. Late Limitation on Doctrine of Earlier Cases.

The doctrine of these cases has had extensive application in the federal courts during the last quarter of a century. From time to time the supreme court has taken occasion to say that the power thus recognized should be sparingly used; and finally this court has been impelled to reconsider its previous utterances and to limit the doctrine strictly to those situations where the claim is at its inception a proper charge against the current account and where the current income is sufficient to pay such claim or where money has been diverted from that fund. The trend of judicial decision, and the extent of the application of the doctrine at the present time, are indicated in the following cases.²⁹

1. *Kneeland v. American Loan & Trust Co.* (1890) 106 U. S. 89, 34 L. ed. 579: On this occasion, the supreme court speaking through Mr. Justice Brewer emphatically said: "Because in a few specified and limited cases this court has declared

²⁸ 117 U. S. 479.

²⁹ In addition to the cases specially noted, see also *Hale v. Frost* (1878) 99 U. S. 689, 25 L. ed. 419; *Huidekoper v. Locomotive Works* (1878) 99 U. S. 258, 25 L. ed. 344; *Burnham v. Bowen* (1884) 111 U. S. 776, 28 L. ed. 596; *St. Louis, Alton etc. R. Co. v. Cleveland etc. R. Co.* (1888) 125 U. S. 658, 31 L. ed. 832; *Union Trust Co. v. Morrison* (1888) 125 U. S. 591, 31 L. ed. 825; *Sage v. Memphis etc. R. Co.* (1888) 125 U. S. 361, 31 L. ed. 694; *Thomas v. Western Car Co.* (1893) 149 U. S. 95, 37 L. ed. 663; *Virginia etc. Coal Co. v. Central Railroad Co.* (1898) 170 U. S. 266, 42 L. ed. 1068; *Southern R. Co. v. Carnegie Steel Co.* (1900) 176 U. S. 257, 44 L. ed. 458; *First Nat. Bank v. Ewing* (C. C. A.; 1900) 43 C. C. A. 150, 103 Fed. 168; *Columbus etc. Co.'s Appeal* (C. C. A.; 1901) 43 C. C. A. 275, 109 Fed. 177; *Gregg v. Metropolitan Trust Co.* (C. C. A.; 1903) 59 C. C. A. 637, 124 Fed. 721; *Fordyce v. Kansas City etc. R. Co.* (1906) 145 Fed. 566; *Fordyce v. Omaha etc. R. Co.* (1906) 145 Fed. 544; *New York etc. Co. v. Louisville etc. R. Co.* (1900) 102 Fed. 382; *Maryland Steel Co. v. Gettysburg El. Co.* (1900) 99 Fed. 150; *Lee v. Pennsylvania Traction Co.* (1900) 105 Fed. 405, 409; *Atchison etc. R. Co. v. Osborn* (1906) 78 C. C. A. 373, 148 Fed. 606, 810.

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that unsecured claims were entitled to priority over mortgage debts, an idea seems to have obtained that a court appointing a receiver acquires power to give such preference to any general and unsecured claims. It has been assumed that a court appointing a receiver could rightfully burden the mortgaged property for the payment of any unsecured indebtedness. . . . When a court appoints a receiver of railroad property, it has no right to make that receivership conditional on the payment of other than those few unsecured claims which, by the rulings of this court, have been declared to have an equitable priority. No one is bound to sell to a railroad company or to work for it, and whoever has dealings with a company whose property is mortgaged must be assumed to have dealt with it on the faith of its personal responsibility, and not in expectation of subsequently displacing the priority of the mortgage liens. It is the exception and not the rule that such priority of liens can be displaced."

2. *Finance Co. v. Charleston, etc. R. Co.* (C. C. A.; 1894) 10 C. C. A. 323, 62 Fed. 205: The court of appeals of the fourth circuit, Justice Fuller delivering the opinion, allowed out of the corpus of the estate unpaid balances due upon accounts with other carriers, accruing before the receiver was appointed. The original order appointing the temporary receiver did not contain authority to make such payments but the order appointing the permanent receiver contained this provision: "That said receiver be further authorized to pay all the wages due to the employees, at the date of the order appointing the temporary receiver herein, for labor and services within ninety days before the same, and also all balances due to other carriers and connecting lines, and necessary to be paid for the conducting of the said railroad." These balances in question were not in fact paid by the receiver, and all the income had been absorbed in current expenses. In approving the action of the lower court in charging these items to the corpus, the court said: "Such indebtedness may be given priority, notwithstanding there may have been no diversion of income, or that the order for payment was not made at the time, and as a condition, of the receiver's appointment, the necessity and propriety of making it depending upon the facts and circumstances of the particular case, and the character of the claims." But he added that the discretion of entering such orders should be exercised with great care. He also remarked upon the tendency of the supreme court to narrow the limits within which such allowances should be made.

3. *Wood v. New York etc. R. Co.* (1895) 70 Fed. 741, 743: The following summary by Judge Colt is well worthy of being here noted: "In respect to the payment by receivers of a railroad of pre-existing current debts, as constituting a preference over outstanding mortgage liens, out of current income coming into their hands, or even out of the proceeds of the sale of the property under foreclosure, it may be observed—First, that no fixed and inflexible rule can be laid down, but that each case is to be largely governed by its own special circumstances; second, that the tendency of judicial decision is to narrow, rather than enlarge, the class of such preferred claims; third, that the allowance of such claims does not depend upon any fixed or arbitrary rule as to the time when the debts were contracted, further than that they must have been incurred within a reasonable time before the appointment of receivers, such reasonable time depending upon the circumstances of each particular case; fourth, that the allowance of such claims does not depend upon the order of the court appointing receivers; fifth, that the current income of a railroad is primarily to be devoted to the pay-

ment of current debts, and that where such income has been used for the payment of interest upon mortgage indebtedness or for permanent improvements, or in any manner has been diverted for the benefit of the mortgagees at the expense of the current debt fund, there must be a restoration to the extent of such diversion; sixth, that, independently of the question of diversion, debts may be preferred which are incurred for labor and supplies necessary to keep the road a going concern from day to day, or which are the outcome of indispensable business relations, a continuance of which involves the interests of the public and the traffic of the road."

In this case the claim was for coupling links, pins, and tank steel furnished to the road within four months preceding the appointment of the receiver. The order appointing the receiver had authorized him to pay accounts for supplies incurred within four months in the operation of the road. The claim was allowed out of the current earnings. The effect was to give it preference over the mortgage lien.

4. *Gregg v. Metropolitan Trust Co.* (1905) 197 U. S. 183, 49 L. ed. 717: Within the six months preceding the appointment of a railroad receiver, one G. furnished cross ties to the road. They were needed to replace ties already decayed. A large proportion were on hand when the receiver was appointed and were used by him. It was conceded that the ties were necessary to preserve the road and keep it in a safe and fit condition for use. It was held that this claim was not chargeable to the corpus so as to displace the pre-existing mortgage lien of the plaintiff to that extent. But it was admitted to be a valid charge against the surplus earnings, if any existed. The case of *Miltenberger v. Logansport etc. R. Co.* (1882) 106 U. S. 286, 27 L. ed. 117, was distinguished; and the authority of that and similar cases was thereby much weakened. Three judges dissented. According to the doctrine of the majority as expressed in this case, a claim not expressly given precedence by the court as a condition of its exercise of its equitable powers cannot be charged to the corpus, unless it is shown that there was a diversion of funds to the corpus that ought properly to have been applied to the payment of the claim, or unless the claim is for labor, or otherwise appears to represent an expenditure absolutely essential to the conduct of the business of the road as distinguished from the preservation of its properties.³⁰

5. *Dickinson v. Saunders* (C. C. A.; 1904) 63 C. C. A. 606, 129 Fed. 16: In proceedings to foreclose a mortgage executed by a granite company and to wind up the corporation and distribute its assets, a receiver was appointed (at the instance and special prayer of the plaintiff) to manage the business and keep it going during the foreclosure proceedings, the idea being to make its assets of the greatest possible value. By the order of appointment the receiver was authorized to pay sums then due to employees. The court below subsequently required the receiver to pay debts due to workmen for service rendered in the three or four months prior to the appointment of the receiver, and the claim was given preference over the mortgage debt. This was approved by the court of appeals.

³⁰ Since this case was decided by the supreme court it has come to be regarded as the rule that supplies furnished to a railroad are not, where there has been no diversion of income, entitled to precedence over a mortgage lien, recorded before the supplies were furnished, unless there is some special and unusual circumstances affecting the claim. See *Queen Anne's Ferry etc. Co. v. Queen Anne's R. Co.* (1906) 148 Fed. 41, 43.

§ 2751. No Preference of Back Debt Unless Chargeable against Current Account.

The most important point to be here borne in mind is found in the proposition that a claim created prior to the receivership can never be given preference unless it arises in immediate connection with the operation and conduct of the business and is of such nature as to be chargeable to the current account. No expenditure is considered of this nature where it is made for purposes of making permanent additions or improvements to the property or where it is of an unusual or extraordinary character and not chargeable to the current account. Even equipment, if supplied in an unusual quantity or under conditions not absolutely requiring it, is not chargeable to the current income, and hence cannot be preferred.³¹ A claim accruing against a railroad, prior to the appointment of the receiver, for the construction of a stone pier and abutments for a railroad drawbridge over a city street cannot be made a preferred claim where there is no surplus income from which it can be paid and no diversion is shown.³² Nor is a claim entitled to preference that represents an obligation of a railroad for the rental of terminal facilities where such facilities do not form an integral part of the road. The same is true of a claim for the cost of constructing tracks in and around such terminal.³³

§ 2752. Ground for Preferring Claim Chargeable against Current Account.

The equity in favor of claims chargeable against the current account grows out of the fact that they are debts incurred under circumstances supporting the presumption of an expectation that they should be paid out of current income. If credit is given by agreement upon such claims for a time which indicates that there was no expectation that the current earnings were to be applied in their payment, or they are allowed to stand unsettled, and without suit, for such a time as indicates that the creditor has ceased to look to current earnings, he will be regarded as a simple unsecured creditor,

³¹ *Lackawanna etc. Co. v. Farmers' Continental Trust Co.* (C. C. A.; 1901) *Loan etc. Co.* (1900) 176 U. S. 298, 315, 111 Fed. 689, 49 C. C. A. 520, 44 L. ed. 475, 484.

³² *International Trust Co. v. T. R. Townsend Brick etc. Co.* (C. C. A.; 1899) 37 C. C. A. 396, 95 Fed. 850.

³³ *St. Louis Merchants' etc. R. Co. v. Co.* (1900) 105 Fed. 405.

Claims for necessary repairs prior to the receivership may be allowed a preference, but not claims for reconstruction. *Lee v. Pennsylvania Traction*

relying alone upon the general credit of the company, and not upon the interposition of a court of equity.³⁴

1. *Illinois Trust & Sav. Bank v. Doud* (C. C. A.; 1900) 53 L.R.A. 481, 44 C. C. A. 389, 105 Fed. 123: This case contains an elaborate examination of the authorities and a very full discussion of the principle governing the right to give preference to an unsecured claim; and in the light of the present attitude of the supreme court, the *résumé* here given is entirely correct. The question was whether a creditor who had loaned money to pay interest on a prior mortgage debt was entitled to be repaid in preference to the mortgage debt. It was held that he was not so entitled. Sanborn, Circuit Judge, said: "A claim for money borrowed or for service rendered or material furnished to construct a necessary, permanent, and beneficial improvement or addition to the mortgaged property of a quasi-public corporation is not entitled in equity to a preference in payment out of the mortgaged property or income over the claims of the bond holders secured by the lien of the prior mortgage, in the face of which the claim accrued; and neither the fact that the consideration of the claim conserved the property, increased the security of the mortgagee, and rendered the operation of the property more economical, nor the fact that it was necessary to keep the mortgagor a going concern, nor the fact that the mortgagor pledged or mortgaged the current income to secure the payment of the claim, can raise such an equity as will entitle it to a preferential lien upon either the income or the corpus of the mortgaged estate over the lien of the prior mortgage."

It was pointed out that the dictum in *Fosdick v. Schall* (1878) 99 U. S. 235, 252, 25 L. ed. 339, 342, to the effect that "necessary operating and managing expenses, proper equipment, and useful improvements" are to be deducted from the current income before the net income out of which the mortgage debt is to be paid arises, has been disapproved and modified; and that the class of claims entitled to equitable preference has been limited, by later decisions, to such as are incurred for the current expenses of the operation of the mortgaged property in the ordinary course of the business of the mortgagor and which are chargeable to the current account.³⁵

The following propositions were then stated as a result of an examination and analysis of the facts and opinions in all the cases decided prior to that time in the supreme court upon the subject of preferential claims in suits to foreclose mortgages upon the property of quasi-public corporations:

"A mortgagee of the property, acquired and to be acquired, and of the income of a quasi-public corporation, such as a railroad company, obtains a lien upon the net income of the company after the current expenses of operation incurred in the ordinary course of business are paid, and impliedly agrees that the gross income shall be first applied to the payment of these current expenses, before the net income to which he is entitled arises.

"A court of equity engaged in administering mortgaged railroad property under a receivership in a foreclosure suit may prefer unpaid claims for current expenses

³⁴ *International Trust Co. v. Town-Farmers' Loan etc. Co.* (1900) 176 U. S. send Brick etc. Co. (C. C. A.; 1899) 37 298, 44 L. ed. 475; *Southern R. Co. v. C. C. A. 396, 95 Fed. 850.* *Carnegie Steel Co.* (1900) 176 U. S. 287,

³⁵ See *Lackawanna Iron etc. Co. v.* 44 L. ed. 458.

of the ordinary operation of the railroad, incurred within a limited time before the receivership, to a prior mortgage lien, in the distribution of the income or of the proceeds of the mortgaged property.

"If such a mortgagor diverts the current income from the payment of current expenses to the payment of interest on the mortgage debt, or to the improvement of the mortgaged property, so that current expenses remain unpaid when a receiver is appointed, the court may, out of the income accruing during the receivership, restore to the unpaid claims for current expenses the amount so diverted. But if there has been no diversion there can be no restoration, and the amount of the restoration cannot exceed the amount of the diversion.

"The class of claims which may be awarded a preference in payment over the prior mortgage debt in equity is limited to claims for current expenses incurred in the ordinary course of the operation of the mortgaged property within a limited time before the appointment of a receiver. It does not include claims for money loaned, or for material or labor furnished to make necessary beneficial and permanent additions or improvements to the mortgaged property. . . . The test of the preferential equity of a claim is its consideration. If its consideration was a current expense of the operation of the mortgaged property, which inured to its benefit, and which was incurred in the ordinary course of its business, within a limited time anterior to the appointment of the receiver, the claim may be preferred. . . . If the consideration of a claim is not a part of the current expenses of the ordinary operation of the mortgaged property, but is a part of the expense of constructing a permanent addition or improvement to it, out of the ordinary course of its operation, neither the fact that it tended to conserve and improve the property and increase the security of the mortgagee, nor the fact that it was necessary to keep the mortgagor a going concern, nor the fact that the mortgagor pledged or mortgaged the current income to secure it, will give the claim a preferential equity over the lien of a prior mortgage."

2. *Rodger Ballast Car Co. v. Omaha, Kansas City etc. R. Co.* (C. C. A.; 1907) 83 C. C. A. 403, 154 Fed. 629: The unsecured claim for which priority over the mortgage lien was asserted arose out of the purchase of ballast cars a short time before the road was put into the hands of a receiver. It was conceded that the purchase of the ballast cars was necessary to keep the railroad a going concern and to continue its business and operation, and that the purchase of these cars conserved and improved the mortgaged property and increased the security of the bondholders secured by the mortgage. On the other hand, there was no evidence that the company had ever bought so large a lot of cars before, or that in the ordinary course of its business it was accustomed to purchase such a lot as a part of the current expenses of the operation of the road. On the contrary, the expense of this purchase was shown not to be a current or customary expense. It was an unusual outlay incurred on an extraordinary occasion to answer an unprecedented demand. Accordingly it was held that the claim could not be allowed a preference. The opinion was by Sanborn, Circuit Judge. After referring to the preceding case, he observed that the opinions of the supreme court on this subject, since that decision was rendered, disclose no modification of the propositions of law formulated in that case, save that the class of claims that may be preferred has been still further restricted by the holding in *Gregg v. Metropolitan Trust Co. ante*, p. 1588.

§ 2753. Diversion of Income as Affecting Right to Charge Corpus.

An equity sufficient to justify the allowance of an unsecured claim for supplies out of the corpus of the property arises where there has been what is called a diversion of income from the current expense account to the payment of the mortgage debt or interest upon it or perhaps even to permanent improvements. In such case any unsecured claim properly allowable against the income from which the diversion took place may be allowed to that extent against the corpus itself.³⁶

International Trust Co. v. T. B. Townsend Brick etc. Co. (C. C. A.; 1899) 37 C. C. A. 396, 95 Fed. 850: Lurton, Circuit Judge, after giving an account of the principle on which a claim for supplies or other operating expenses may be made a preferred charge against the income or "current debt fund," proceeded to give an account of the origin of the "diversion" or "restoration" doctrine. Said he: "These 'debts of the income' are an 'equitable charge' only upon the 'current income' of the mortgaged railroad. If such debts remain unpaid when the railroad passes into the possession of a court of equity, this 'equitable charge' is continued, and attaches to the 'surplus income' arising under the receivership. If this surplus income is not applied to the payment of the debts to which it is primarily devoted, but is expended for the benefit of the mortgagee, as in payment of interest, or in the purchase of property which passes under the mortgage, or in betterments of the railroad itself, an equity arises, as a consequence of such diversion, which will justify a court of equity in requiring the mortgagees to restore to the income that which has been taken away. The power of the court to displace mortgage liens in favor of such unsecured debts of the mortgagor depends upon the fact that the current income, either before or after the receivership, has been diverted to the benefit of the displaced mortgage, and the extent to which the corpus of the mortgaged property can be called upon to pay such debts of the income is limited by the amount of the diversion."

§ 2754. Equity Arising from Failure of Mortgage Creditors to Foreclose.

Where the mortgage creditors fail to take possession of the property promptly upon default or to institute foreclosure proceedings, but, on the contrary, stand by and see outsiders advancing money in the effort to keep the property on sound footing, an equity arises that will give the unsecured creditor a right of priority over the mortgage. This equity is especially strong where the creditors themselves have actually obtained advancements and supplies to be used in sustaining

³⁶ A petition for the allowance of a pointment of the receiver. *International Trust Co. v. Townsend Brick etc. Co.* (C. C. A.; 1899) 37 C. C. A. 396, 95 Fed. 862. claim for current supplies out of the corpus of the trust fund, there being no surplus income, must allege a diversion of income either after or before the ap-

the tottering enterprise on which they hold the first mortgage. Here they are practically estopped to questions that such advances are a first charge on the proceeds of the sale in preference even over their mortgage lien.

Queen Anne's Ferry etc. Co. v. Queen Anne's R. Co. (1906) 148 Fed. 41: This case furnishes a good illustration of the equity in question. The mortgage creditors (bondholders) instead of requiring the trustee to take possession on default in accordance with the provisions of the mortgage, proceeded instead to select a committee of their own number to manage the insolvent property and keep it going. This committee incurred debts for supplies and operating expenses. Afterwards the property was foreclosed and bought in, virtually by representatives of the mortgage creditors. It was held that the debts incurred by the managing committee had a preferential equity in the proceeds. This committee was in fact and in effect the agent of the bondholders, and the debts contracted by it in doing what it was appointed to do were in equity the debts of the bondholders themselves.

§ 2755. Period for Which Back Debts May Be Preferred.

In regard to the period preceding the appointment of the receiver during which claims for supplies can properly be made preferential, six months seems to have been conventionally adopted as the proper time beyond which the court should not usually go.³⁷ But this period is by no means an inexorable limitation, and the court may, in its discretion, give priority to a claim arising more than six months before the appointment of the receiver.³⁸

St. Louis Merchants' etc. Co. v. Continental Trust Co. (O. C. A.; 1901) 49 C. C. A. 529, 111 Fed. 669: In the order directing the receiver to take possession and operate said railroad, it was, among other things, directed that the receiver, out of the income of the receivership and after paying his operating expenses and taxes due or to become due, should pay all amounts due or to become due employees of said railroad company, all claims for labor and services, all claims for materials and supplies furnished said railroad company within six months prior thereto, and all balances due or to become due to other railroad or transportation companies on balance accruing within six months prior hereto. This was said to be the usual order for the payment of six months' claims.

³⁷ *Gregg v. Metropolitan Trust Co.* Southern R. Co. v. Carnegie Steel Co. (1905) 197 U. S. 196, 49 L. ed. 721; (1900) 176 U. S. 257, 44 L. ed. 458, 20 Bosworth v. St. Louis Terminal, etc. Sup. Ct. 347, affirming (1896) 22 C. C. Ass'n (1899) 174 U. S. 182, 43 L. ed. A. 289, 76 Fed. 492; *Atkins v. Petersburg R. Co.* (1879) 3 Hughes 307; 941.

³⁸ *Hale v. Frost* (1878) 99 U. S. 389, *Skiddy v. Railroad Co.* (1879) 3 Hughes 25 L. ed. 419; *Burnham v. Bowen* 320. (1884) 111 U. S. 776, 28 L. ed. 596;

§ 2756. Juncture at Which Question of Priority Determined.

In determining whether an unsecured claim created prior to the receivership is to be given preference, it is important to consider the conditions under which the question arises and is brought up for final determination. For instance, if the court, upon the appointment of the receiver, authorizes him to pay claims of a certain character, and he acts upon such order, he is protected, and the payment must be ratified, unless of course where the right to reconsider the claim is reserved. On the other hand, if the court authorizes a receiver to pay claims of a certain kind, but does not make it mandatory upon him to make such payment, or if, for lack of funds, he is unable to pay them, and the matter comes up for consideration at the final hearing, the court is not concluded by its previous interlocutory order authorizing the payment of the claim, but may consider and determine upon equitable principles the extent of the liability of the property to such claims. Always, where the receiver does not pay a claim, the parties in interest may rightfully challenge its priority, even if it is within the very letter of the order of appointment.³⁹ And as a matter of course where the court has made no previous order authorizing the payment of a claim the question of its priority is to be finally determined in accordance with equitable principles.

Receiver's Certificates.

§ 2757. Power of Court to Authorize Issuance of Lien Certificates.

Receiver's certificates are evidences of indebtedness issued by the receiver under the authority of the court of his appointment. They may be issued either in consideration of claims that have already accrued or in consideration of money advanced, work done, or materials furnished, upon the faith of the certificates. They are usually made a first lien on the property.⁴⁰

The power of the court to authorize the issuance of certificates constituting a first lien is merely a manifestation of its general power, already discussed, of creating preferred charges against the property; and of course the issuance of certificates creating a priority over exist-

³⁹ *Louisville etc. R. Co. v. Wilson* 2 Dill. 448; *Montreal Bank v. Thayer* (1891) 138 U. S. 508, 24 L. ed. 1025. (1881) 7 Fed. 622; *Union Trust Co. v.*

⁴⁰ *Ehaw v. Little Rock etc. R. Co.* *Chicago etc. R. Co.* (1891) 7 Fed. 512; (1879) 100 U. S. 605, 25 L. ed. 757; *Credit Company v. Arkansas etc. R. Co.* *Kennedy v. St. Paul etc. R. Co.* (1873) (1882) 15 Fed. 46.

ing liens will not be authorized unless the circumstances are sufficient to justify a preference.

Mercantile Trust Co. v. Kanaicha etc. R. Co. (C. C. A.; 1893) 7 C. C. A. 3, 58 Fed. 6: Judge Taft expounded the principle upon which the court acts in authorizing the issuance of receiver's certificates in the following words: "A court of equity which, in foreclosure or other suit, has taken into its custody railroad property, may authorize its receivers to borrow money for the preservation, maintenance, or necessary betterment of the road, and may, by its order, make the loans thus incurred a paramount lien on the income and corpus. The court does not act as the agent for the parties in the sense that it creates the lien by contract of the parties with the lenders, but by virtue of its custody of the property and its jurisdiction of the parties, it pledges its own faith to the lender that it will enforce such a lien against the property and the parties, as a condition of its releasing the property and of its enforcing any equities in favor of any of those who invoke its assistance."

A court appointing a receiver has no power to authorize the issuance of receiver's certificates which shall constitute an absolute lien on the property superior to that of one who is not a party to the suit.⁴¹ But if it is feasible to bring such parties in and they are brought in, the court may then determine whether the certificates previously issued and declared to be a first lien shall be allowed priority or deprived of it.⁴²

§ 2758. Validity and Character of Certificates as Affected by Order.

The validity of receiver's certificates depends on and is governed by the authority under which the certificates are issued. The receivers cannot give to the certificates the character and quality of commercial paper, so as to make them good in the hands of any *bona fide* purchaser without reference to the terms of the order under which they were issued. Receiver's certificates are not negotiable instruments in the technical sense.⁴³ Where a court authorizes the use of certificates for a particular purpose, and the receiver applies them to debts of different character, a general creditor who takes them under such conditions is entitled to no priority over other general creditors.⁴⁴ Even a subsequent innocent purchaser for value does not get an

⁴¹ *Metropolitan Trust Co. v. Lake etc. R. Co.* (1900) 100 Fed. 897.

⁴² See *Hervey v. Illinois Midland R. Co.* (1884) 28 Fed. 169, 176.

⁴³ *Union Trust Co. of New York v. Chicago etc. R. Co.* (1881) 7 Fed. 513. Where the order authorizing the sale of receiver's certificates names an upset

price below which they are not to be marketed, a purchaser paying less than that sum can enforce them only to the extent of the sum actually paid by him with interest. *Stanton v. Alabama etc. R. Co.* (1887) 2 Woods 506, 31 Fed. 535.

⁴⁴ *Fidelity etc. Co. v. Shenandoah Iron Co.* (1889) 42 Fed. 372.

indefeasible title. He takes strictly subject to the order of the court authorizing the certificates and is chargeable with notice of any defect in the title of those from whom the certificates are obtained.

Central Nat. Bank v. Hazard (1887) 30 Fed. 484: A receiver collusively negotiated certificates to one C. at a considerably lower price than they should have brought, with the result that less was realized for the benefit of the trust than should have been realized. C. negotiated the certificates to innocent purchasers for value. It was held that these holders could enforce the certificates only to the extent of the value paid by C. Said the court: "Receiver's certificates are not commercial paper, and the holder takes them subject to all equities between the original parties, even though he acquires them for value and without notice; and when they are negotiated at a discount, which the receiver is not authorized to allow, a *bona fide* holder will only be protected to the amount actually advanced by the first purchaser."

§ 2759. Order Allowing Sale of Certificates at Reasonable Discount.

It is within the competence of a federal court of equity, upon authorizing a receiver to issue certificates, to allow him to dispose of them at such reasonable discount as may be necessary under the particular circumstances to enable him to obtain the money upon them. In a case where the order of the court below authorized the certificates to be sold at not more than ten per cent. discount, and there was nothing in the record to show that the money could have been raised without such a provision being inserted, the supreme court allowed the certificates to be paid in full with interest, notwithstanding the fact that they had been sold at the discount mentioned. It must be presumed, said the court, that the parties taking the certificates relied on the promise to pay their face, and would not otherwise have trusted the receiver or the fund.⁴⁵ But in a case where the receiver had *hypothecated* certificates, without express authority contained in the order under which the certificates were allowed to be issued, at a discount of ten per cent., the person advancing money to the extent of ninety cents on the dollar was not allowed to be paid to the extent of the full face value with interest, but was limited to the amount actually advanced, with interest.⁴⁶

§ 2760. Same—Effect of State Usury Law.

In allowing receiver's certificates to be disposed of at a discount, the federal courts appear not to be bound by the usury laws of the

⁴⁵ *Union Trust Co. v. Illinois Mid. land R. Co.* (1886) 117 U. S. 434, 29 L. ed. 263. ⁴⁶ *Swann v. Clark* (1884) 110 U. S. 602, 28 L. ed. 256.

respective states of the Union;⁴⁷ but unusual and unnecessary discounts are recognized as improper, and a person who takes receiver's certificates at an abnormal discount would certainly be held not to be an innocent purchaser to the full extent of their face value.⁴⁸

§ 2761. Petition of Receiver for Leave to Issue Certificates.

The consent of a court to the issuance of receiver's certificates is usually obtained upon petition of the receiver,⁴⁹ though the order is not infrequently granted simultaneously with the appointment of the receiver.⁵⁰ In his petition for leave to issue certificates the receiver should make a detailed statement specifying the sums needed, and for what they are needed; and clear proof should be adduced of the correctness of the statement, and of the necessity that the money be raised. A receiver is required upon the final presentation of his accounts, to state clearly the various items; and in like manner, when he asks authority to create in advance a debt against the property by which money is to be put into his hands, he ought to show good reasons why the application should be granted.⁵¹

§ 2762. Notice of Application—Effect of Want of Notice.

Upon application for leave to issue receiver's certificates that shall constitute a first lien on the property, the bondholders, general creditors, and other persons having an interest to be affected thereby, should be given due notice in order that they may have an opportunity to appear and be heard. It does not follow from this that the court cannot grant leave for the issuance of such certificates on an *ex parte* application of the receiver, for it has been held that it has such power.⁵² But in a case where no such notice is given and the order is made *ex parte*, the court has the power subsequently, upon hearing all the parties, to modify the order and to deprive those certificates of their priority. Every purchaser of such certificates therefore assumes

⁴⁷ *Stanton v. Alabama etc. R. Co.* 339; and no doubt at this time such an abnormal discount would not be tolerated. *Woods* 506, with which compare *Meyer v. Johnston* (1875) 53 Ala. 237, 351. ⁴⁸ *Investment Co. v. Ohio etc. R. Co.* (1888) 36 Fed. 48.

⁴⁹ In *Southerland v. Lake Superior Ship etc. Co.* (1872) MS., the receiver was authorized to dispose of his certificates at a discount not exceeding twenty-five per cent. This order has been criticised as an abuse of the usury laws. ⁵⁰ *Kennedy v. St. Paul etc. R. Co.* (1873) 2 Dill, 448, 450.

⁵¹ *Meyer v. Johnston* (1875) 53 Ala. 350. ⁵² *Mercantile Trust Co. v. Kanawha etc. R. Co.* (1892) 50 Fed. 874.

the risk of the final action of the court touching their right to priority.⁵³

Laughlin v. U. S. Rolling-Stock Co. (1894) 64 Fed. 25: Certificates issued upon an *ex parte* application were turned over to creditors in satisfaction of claims accruing prior to the receivership for goods sold to the company in the ordinary course of business, for money loaned to it, for salaries of its officers, and for counsel fees. The court in finally passing upon the certificates refused to give them a preferential lien and put them on the same footing as other unsecured claims.

§ 2763. Consent and Estoppel as Affecting Validity of Certificates.

A plaintiff who consents to the issuance of receiver's certificates that shall be a first lien thereby postpones his own lien to that of the certificates, although there are others in the same class who do not consent and who are therefore not postponed.⁵⁴ Likewise a party who, pending the proceedings, stands by and sees obligations incurred and expenditures made under an order of court authorizing certificates to be issued, without making objection, is precluded from afterwards questioning the preference of the certificates.⁵⁵

§ 2764. Application of Proceeds of Certificates.

Parties who actually advance money to a receiver on his certificates, the issuance of the same being duly authorized by the court, are not bound to see that the funds thus put into the hands of the receiver are properly applied.⁵⁶ But before receiver's certificates can constitute a valid charge on the funds or property in the hands of the receiver, the proceeds must come to his hands, custody, or control. It is not necessary that the actual money should be turned over to him. It is enough if credit is entered to his account at a bank with his approval. The subsequent failure of the bank in such a case and the consequent loss of the funds by him does not defeat the lien of the certificates.⁵⁷

⁵³ *Union Trust Co. v. Illinois etc. R. Co.* (1882) 106 U. S. 286, 1 Sup. Ct. Co. (1886) 117 U. S. 434, 460, 6 Sup. Ct. 809, 29 L. ed. 963, 972; *Mercantile Trust Co. v. Kanawha etc. R. Co.* (C. C. A.; 1890) 75 Fed. 193, 209, 21 C. C. A. 291. ⁵⁴ *Union Trust Co. v. Illinois Mid-land R. Co.* (1886) 117 U. S. 484, 29 L. ed. 963; *Stanton v. Alabama etc. R. Co.* (1887) 2 Woods 506. ⁵⁵ *Alabama Iron & R. Co. v. Anniston Loan & Trust Co.* (C. C. A.; 1893) 57 Fed. 25, 6 C. C. A. 242. ⁵⁶ *Compare Farmers' Loan etc. Co. v. Centralia etc. R. Co.* (C. C. A.; 1899) 96 Fed. 636, 37 C. C. A. 528.

⁵⁷ *Miltnerberger v. Logansport etc. R.*

§ 2765. Strict Construction of Orders Authorizing Certificates.

Orders authorizing the issuance of receiver's certificates that shall constitute a prior lien are to be strictly construed, and the certificates cannot be used for any purpose other than that specified by the court. An order authorizing the issuance of receiver's certificates to raise money does not authorize the issuance of certificates in consideration of services already rendered or advances already made.⁵⁸ Under an order authorizing certificates to be issued to pay wages, a certificate cannot properly be issued to pay a store account, although this store account represents indebtedness due by reason of goods sold to employees on wage orders.⁵⁹

An order authorizing a railroad receiver to let a contract for building and equipping a line of road for which he is to pay by delivering his certificates to the contractor at a stated rate per mile as the road is finished does not contemplate the creation of a lien in favor of persons who furnish work or supplies to the contractor. In the absence of statute such creditors of the contractor must look exclusively to him for payment.⁶⁰

§ 2766. Liability of Receiver for Misrepresentation.

A receiver who puts upon the market certificates containing a fraudulent misrepresentation to the effect they were issued in pursuance of an order of the court, that they constitute a first lien on the property, and that they were given for iron rails furnished for constructing the road, is personally liable in an action of deceit to any innocent purchaser who is damaged by such false representation.⁶¹

§ 2767. Priority of Certificates of Different Series.

Where a court that has previously authorized the issuance of a series of certificates constituting a first lien on the property finds it necessary to authorize a second series, it is not proper to give the second series priority over the first, without the consent of the holders of the prior certificates. Both series should as a rule be permitted to share equally.⁶² But in determining the priority, as between themselves, of claims represented by different series of receiver's certi-

⁵⁸ *Stanton v. Alabama etc. R. Co.* (1887) 31 Fed. 585.

⁵⁹ *Fidelity Ins. etc. Co. v. Shenandoah Iron Co.* (1889) 42 Fed. 372.

⁶⁰ *Denison etc. R. Co. v. Ranney-Alton etc. Co.* (C. C. A.; 1900) 104 Fed. 595, 44 C. C. A. 65.

⁶¹ *Bank of Montreal v. Thayer* (1881) 7 Fed. 622.

⁶² *Bibber-White Co. v. White River etc. R. Co.* (C. C. A.; 1902) 115 Fed. 786, 53 C. C. A. 282.

cates, it is sometimes important to distinguish between certificates issued for the purpose of paying off prior indebtedness incurred before the appointment of the receiver and those incurred by the court itself (or under its express direction) while the property is in the hands of the receiver. The latter are, or may be, given precedence over the former.⁶³ The circumstance that certificates are applied to the payment of pre-existing debts deprives them of the right to share equally with certificates used to secure advancements or to pay debts created by the court.

Bank of Commerce v. Central etc. Coke Co. (C. C. A.; 1902) 115 Fed. 378, 53 C. C. A. 334: Certificates of class B were issued to pay debts of a road for labor, materials, and supplies prior to the appointment, and these certificates were made a lien superior to the lien of the mortgage in suit. Certificates of class A were issued to raise money for improvements and repairs authorized by the court and also for taxes. These certificates were likewise made a lien superior to the mortgage debt. The order, however, was silent as to which class of certificates should have priority as between themselves. In finally disposing of the fund, the court ordered that the A certificates were to be given preference over B certificates. Said the court: "Debts contracted by the railroad company on its credit, although they belong to the class called 'preferential,' do not rank on the same high plane with debts contracted by the court on its credit; and, where the property or fund in the custody and control of the court is not adequate to pay both classes, preference will be given to the debts contracted by the court. The obligation of the railroad company to pay its debts is not affected by the receivership and foreclosure. It retains its corporate existence, and its creditors may still pursue it, and in some cases its officers and stockholders. But it is not so with the debts contracted by the court. They are not debts of the railroad company, and the company is not liable for them. The court alone is liable for its debts. That obligation imposes on the court the duty to apply the property or its proceeds in its custody and control to the payment of the debts contracted by it in and about the management of the property. Judicial repudiation of obligations is not to be sanctioned under any conditions. One of the chief duties of courts of justice is to compel delinquent debtors to pay their debts. It could do this with poor grace indeed if it neglected to pay its own debts when it had the means to do so."

§ 2768. Estoppel of Purchaser to Question Validity of Certificates.

A purchaser of property at a foreclosure sale is estopped from questioning the validity of receiver's certificates when they have been adjudged by the court to be a valid lien and the sale is expressly made subject to such incumbrance.⁶⁴ If the certificates are not valid the

⁶³ *Mercantile Trust Co. v. Farmers' Loan etc. Co. v. Stuttgart etc. R. Co. etc. Co.* (1897) 81 Fed. 254, 26 C. C. A. (1901) 106 Fed. 565. 383; *Bank v. Ewing* (C. C. A.; 1900) ⁶⁴ *Central Trust Co. v. Sheffield etc.* 103 Fed. 168, 43 C. C. A. 150; *Farmers' R. Co.* (1890) 44 Fed. 523. In *Swann v.*

question should be raised by those entitled to the proceeds of the sale, not by the purchaser, for presumably he obtained the property at a price based on the theory that the lien of the certificates was valid. A similar estoppel of the purchaser arises from a clause in his deed expressly making the conveyance subject to the payment of the certificates.⁶⁵

§ 2769. Modes of Enforcing Lien of Certificates.

A court may enforce the lien created by it in favor of receiver's certificates in either of two ways: (1) It may directly order the payment of the loan represented by the certificate out of the proceeds of the sale; or (2) it may impose a continuing lien on the property by providing in the decree of sale that the purchaser shall take the property subject to such a lien. If the latter method is followed, a lien is thereby established by contract with the purchaser in favor of the certificate. This lien, appearing in the chain of title by which the purchaser holds, is attached to the property in the hands of all subsequent grantees of the purchaser, and may, of course, be enforced by the holder of the certificate in an independent action. But where the record, and especially the final decree and the deed executed in pursuance thereof, shows a manifest intention on the part of the court to vest in the purchaser a title free from all incumbrances, the holder of certificates cannot follow the property and enforce the lien on the same in the hands of the purchaser. He must look to the fund representing the proceeds of the sale. And the circumstance that the purchaser may have paid a large part of the purchase price by cancelling the mortgage debt instead of by paying money, does not necessarily change the rule.⁶⁶

The question whether the lien of receiver's certificates is transferred, on a sale of the property, to the fund representing the proceeds of the sale or whether, on the other hand, the lien follows the property itself into the hands of the purchaser, depends primarily on

Wright's Ex'rs (1884) 110 U. S. 590, 4 Sup. Ct. 235, 28 L. ed. 252, a decree in a mortgage foreclosure provided that the sale of the mortgaged property should be made subject to the payment of all receiver's certificates which had been established as valid by prior decrees in the suit or by that decree, and it was held that the purchaser at the sale could not contest the lien of certificates, the validity of which had been established by an interlocutory decree, even upon the ground of concealment and fraud subsequently discovered, by which, as was alleged, the decree had been obtained.

⁶⁵ *Central Nat. Bank v. Hazard* (1887) 30 Fed. 484. See *Gordon v. Newman* (C. C. A.; 1894) 62 Fed. 686, 10 C. C. A. 587.

⁶⁶ *Mercantile Trust Co. v. Kanawha etc. R. Co.* (C. C. A.; 1893) 58 Fed. 8, 7 C. C. A. 3, reversing (1892) 50 Fed. 874.

the terms of the contemporaneous decrees or orders of the court. But if these are silent on that point, reference may be had for the solution of this problem to the general situation and state of the case.⁶⁷ Receiver's certificates constitute no lien on the property in the hands of the purchaser at the receiver's sale where the order of sale contemplates that the sale shall be free from liens and that the certificates shall be a charge on the proceeds of the sale only.⁶⁸

§ 2770. When Formal Intervention by Holder of Certificates Unnecessary.

A formal intervention is not necessary in receivership proceedings in order to enable the holder of certificates, issued under the authority of the court to pay off indebtedness contracted by the court, to enforce the same. The preferential character of such certificates is established by the order of the court directing the receiver to contract the debt and issue the certificates. A debt thus contracted is in effect an audited claim from the beginning, and the court should provide for the payment of it without being moved thereto by any formal proceedings.⁶⁹

§ 2771. Effect of Undue Delay in Presentation of Certificates.

But the holder of receiver's certificates is put upon inquiry as to the proceedings that take place in the receivership suit, and if he unduly delays the presentation of his claim and fails to call the attention of the court thereto until the receivership is discharged, the property turned over to the purchaser, and the fund distributed, he will be precluded by his laches from thereafter enforcing the claim. Receiver's certificates are not to be considered to be so far of the nature of call loans that the holder of the certificates may safely await notification of the time when the money is to be paid. He is bound to see that his claim is properly and timely presented.⁷⁰

⁶⁷ *Mercantile Trust Co. v. Kanawha etc. R. Co.* (1892) 50 Fed. 874. But note that, on the particular facts, this case was reversed in (C. C. A.; 1893) 58 Fed. 6, 16, 7 C. C. A. 3. ⁶⁸ *Bank of Commerce v. Central etc. Coke Co.* (C. C. A.; 1902) 115 Fed. 878, 881, 53 C. C. A. 334. ⁶⁹ *Mercantile Trust Co. v. Kanawha etc. R. Co.* (C. C. A.; 1893) 58 Fed. 6, 7 C. C. A. 3, reversing (1892) 50 Fed. (1901) 109 Fed. 177, 48 C. C. A. 275; *Gordon v. Newman* (C. C. A.; 1894) 62 Fed. 686, 10 C. C. A. 587. ⁷⁰ *Eq. Prac. Vol.* —101.

CHAPTER LXVII.

RECEIVERS (*continued*).

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*Compensation and Expenses of Receiver.**In General.***§ 2772. Amount of Compensation Determined by Court.**

A receiver is entitled to a reasonable compensation for his services; and in the absence of legislation regulating his salary or the compensation to be paid, the amount to be allowed is to be determined by the court in which the receivership proceedings are pending. The power of such court to fix the compensation of the receiver is a necessary consequence of the relation that the receiver sustains to the court.¹

In a removal cause the federal court may compensate a receiver for services rendered in his capacity as receiver under the orders of the state court in that case prior to removal, but it will not allow him compensation for services rendered as receiver in a state court in a different suit over which the receivership proceedings in the state court had been extended, but which was not removed.²

§ 2773. Compensation and Expenses Chargeable against Fund.

The expenses of the receivership, including the compensation of the receiver, are not considered a proper charge against either litigant, in the first instance, and they are not ordinarily imposed on either party, as are the ordinary costs of a suit. The expenses of the receivership constitute a proper charge against the property or fund committed to the keeping of the receiver; and a receiver's right to be paid from the fund is not defeated by the circumstance that the plaintiff is beaten in the suit,³ or even that the receiver was erroneously

¹ *Stuart v. Boulware* (1890) 133 U. S. 78, 82, 33 L. ed. 568, 570.

² *Elk Fork Oil & Gas Co. v. Jennings* (1898) 90 Fed. 767.

³ *In re Hinckley* (1880) 3 Fed. 556.

appointed upon a bill that failed to show a cause of equitable cognizance.⁴ The proper expenses of a receivership should never be taxed as costs against the losing party, if the appointment of the receiver was proper and legal and was made by the court in the exercise of its rightful jurisdiction; that is, of course, where the fund in the receiver's hands is sufficient to pay the expenses.⁵

§ 2774. Compensation of Master Passing on Receiver's Accounts.

The compensation of the master who passes on the accounts of a receiver is chargeable to the fund in the receiver's hands; and if the property has been turned over before the allowance is made, it may be charged upon the property. The same is true of the allowance made to the receiver's attorney.⁶

§ 2775. When Compensation of Receiver Chargeable to Plaintiff.

The expense of a receivership may be charged to the share of one or more of the parties in interest rather than to the entire fund, where a contract made between the parties prior to the receivership makes it proper for some to bear all of the expenses.⁷ In a case where the order granting a receiver was highly injurious and there was practically no basis for the suit, the plaintiff was charged with the expenses.⁸ The same will be done where the appointment of the receiver is beyond the competency of the court.⁹

If the property committed to a receiver fails to realize enough to pay the expenses of the receivership proceedings, the right course is to go against the plaintiff who procured the appointment of the receiver. The court has ample authority to charge the expenses of the receivership to him. Nor does it lose jurisdiction over him in this respect by passing a decree confirming the sale, where such decree pretermits the question of costs and expenses to a later stage of the cause and expressly retains jurisdiction of that matter. The authority

⁴ *Clark v. Brown* (1902) 57 C. C. A. R. Co. (C. C. A.; 1899) 93 Fed. 60, 35 76, 119 Fed. 130.

⁵ *Ferguson v. Dent* (1891) 46 Fed. 88, 98. As to the considerations governing the compensation of masters in chancery, see, *ante*, § 1468.

Neither the receiver nor his counsel is entitled to an allowance out of assets that were pledged to another prior to the appointment of the receiver and which have not come to his hand and in respect to which he has done nothing. *Girard Trust Co. v. McKinley-Lanning L. etc. Co.* (1906) 143 Fed. 355.

⁶ *Pennsylvania Co. v. Jacksonville etc.*

⁷ *Rosenthal v. McGraw* (C. C. A.; 1905) 71 C. C. A. 277, 138 Fed. 721.

⁸ *Harrington v. Union Oil Co.* (1906) 144 Fed. 235. See *In re Lacov* (C. C. A.; 1905) 74 C. C. A. 130, 142 Fed. 960.

⁹ *Couper v. Shirley* (C. C. A.; 1896) 21 C. C. A. 288, 75 Fed. 168.

of the court in this respect is not limited to cases where at the outset it has required the plaintiff, as a condition of the appointment of a receiver, to undertake to be liable for the expenses.¹⁰

§ 2776. Apportionment of Expenses among Different Funds.

Expenses chargeable to the receivership property should be equitably apportioned among the different funds or among the different pieces of property. For instance, where some of the property over which the receivership had originally extended had been surrendered at a certain stage of the proceeding, it was held that expenses that had been incurred prior thereto should be partly imposed on the property so surrendered.¹¹

§ 2777. Revival of Judgment for Receiver's Compensation.

Where a personal judgment has been entered in the receiver's lifetime in his favor for his compensation and allowances for administering the receivership, and no one has been appointed as his successor in the trust, the suit may be revived, at least as to such claim, in the name of his representative, he having died pending the appeal.¹²

Amount of Compensation.

§ 2778. Discretion of Lower Court as to Amount of Receiver's Compensation.

The amount of compensation to be allowed to the receiver is a matter largely within the discretion of the court appointing the receiver.¹³ The appellate courts are loath to interfere with the exercise, by the court of first instance, of the discretionary power involved in fixing the compensation of the receiver and in making allowances for services rendered to him by counsel. The lower court has, or is supposed to have, better knowledge than the appellate court can have

¹⁰ *Chapman v. Atlantic Trust Co.* (C. C. A.; 1902) 56 C. C. A. 61, 119 Fed. 257; *Atlantic Trust Co. v. Chapman* (C. C. A.; 1906) 76 C. C. A. 396, 145 Fed. 820.

¹¹ *Pennsylvania Co. v. Jacksonville* etc. R. Co. (C. C. A.; 1895) 13 C. C. A. 550, 66 Fed. 421.

As to when the receiver's allowance is chargeable against general and special funds in his hands, see *Girard Trust Co. v. McKinley-Lanning L. etc. Co.* (1906) 143 Fed. 355.

¹² *Cake v. Mohun* (1896) 164 U. S. 311, 41 L. ed. 447, 17 Sup. Ct. 100.

¹³ *Hinckley v. Gilman* etc. R. Co. (1879) 100 U. S. 153, 25 L. ed. 591; *Gaines v. Mills* (C. C. A.; 1893) 13 U. S. App. 229, 4 C. C. A. 521, 54 Fed. 614, 617; *Northern Ala. R. Co. v. Hopkins* (C. C. A.; 1898) 31 C. C. A. 94, 87 Fed. 509.

It has been observed that the courts of first instance are not prone to make allowances that are too small. *Braman v. Farmers' Loan etc. Co.* (C. C. A.; 1902) 51 C. C. A. 644, 114 Fed. 20.

of the services actually bestowed and it has better means of determining the value of those services. As a consequence the action of the lower court on this question will be modified or reversed only in a case of an actual abuse of discretion or where the allowance is manifestly excessive or too small.¹⁴

1. *Cake v. Mohun* (1896) 164 U. S. 311, 41 L. ed. 447: The supreme court here thought that the allowance fixed by the lower court for the compensation of the receiver was over-liberal and said that, if it had been an original question, the allowance would have been made considerably smaller. Nevertheless, in view of the fact that there was evidence strongly tending to show that the compensation was just, and in view of the fact that the claim had been successively approved by the auditor, court, and the court of appeals below, the supreme court refused to disturb it. Ten per cent. was here allowed on the receipts of the business.

2. *Wilkinson v. Washington Trust Co.* (C. C. A.; 1900) 42 C. C. A. 141, 102 Fed. 28, 31: Discussing the discretionary authority of the court of equity to fix the compensation of its receiver, Sanborn, Circuit Judge, observed: "In the administration of a trust by a court through its receiver, the chancellor, who appoints, supervises, and directs his action, necessarily knows, better than any record can teach an appellate court, what his appointee has done, and what is a just and reasonable compensation for his services. His allowances of this character ought to be, and are, largely discretionary with the chancellor, and they should not be disturbed unless there has been a manifest disregard of right and reason."

3. *Drey v. Watson* (C. C. A.; 1906) 71 C. C. A. 158, 138 Fed. 792: Though expressing reluctance to interfere with the discretion of the court of first instance, the court of appeals nevertheless set aside an order fixing the compensation of a receiver and his attorney on the ground that the amount allowed was excessive. It was observed that when property is put into the hands of a receiver "its administration should be conducted in the same way, and the same rules of prudence and economy should be observed by the receiver, that obtain in the management and control of the private interests of individuals."

4. *Boston Safe-Deposit etc. Co. v. Chamberlain* (C. C. A.; 1895) 66 Fed. 847, 14 C. C. A. 363: In cutting down the allowances made by the lower court to the receiver and his counsel, the court of appeals of the fourth circuit expressed reluctance in so doing but added: "It is important that the circuit courts of appeals should endeavor in their respective circuits to bring about as much uniformity in such allowances as the cases will admit of. Such services, under some peculiar circumstances, or by agreement of the parties before the court, or upon *ex parte* applications, have often been, in many courts of this country, so extravagantly compensated that we think there has been a tendency to establish a standard of compensation in matters connected with railroad foreclosures which

¹⁴ *Trustees v. Greenough* (1882) 105 12 C. C. A. 215, 64 Fed. 450; *Trust Co. U. S.* 527, 537, 26 L. ed. 1157, 1162; *v. McClure* (1897) 24 C. C. A. 64, 78 *Stuart v. Boulware* (1890) 133 U. S. Fed. 209; *Braman v. Farmers' etc. Co.* 78, 82, 10 Sup. Ct. 242, 33 L. ed. 568, (C. C. A.; 1902) 114 Fed. 18, 51 C. C. 570; *Whitney v. New Orleans* (1893) A. 644; *In re Michigan Cent. R. Co.* 4 C. C. A. 521, 54 Fed. 614; *Southern* (C. C. A.; 1903) 59 C. C. A. 643, 124 Cal. etc. Co. v. Union etc. Co. (1894) Fed. 727, 733.

is unreasonably liberal as compared with similar services in any other employment or with respect to any other subject-matter."

§ 2779. When Conventional Allowance of Five Per Cent. Proper.

Where a small fund is administered the usual compensation of five per cent. allowed to accountants¹⁵ is considered to be proper compensation for the receiver.¹⁶ But this rule is not inflexible, and a less sum or a greater¹⁷ may be allowed if the particular service rendered makes it proper. Where large sums pass through the receiver's hands the five per cent. rule would lead to excessive allowances, and consequently in such cases the receiver is given a salary or is paid such round sum as the conditions seem to warrant.¹⁸

§ 2780. Considerations Affecting Amount of Allowance.

The question of the amount of compensation of a receiver is to be determined on equitable principles,¹⁹ with a due regard to the value and utility of the services rendered and to the degree of responsibility involved.²⁰ The circumstance that a receiver has raised a large sum of money on his personal guaranty and used it for the purposes of the trust should be taken into account in fixing his compensation.²¹ The compensation of the receiver is not necessarily to be measured by the amount which, after the work is done, it appears that another person would have been willing to do the work for. The receiver's office is not put up at auction, and his compensation is not determined on that principle. The court selects a competent and trustworthy person, and he is to be paid a just compensation under all the circumstances.²² The action of the court should neither be tinged with parsimony nor characterized by extravagance.²³

Exceptional energy and vigilance on the part of a receiver may be a good ground for liberal compensation.²⁴ But it has been held that the circumstance that a receiver has been able to introduce economies into the administration of the trust, as for instance, by combining the

¹⁵ *Girard Trust Co. v. McKinley-Lanning etc. Co.* (1906) 143 Fed. 355.

¹⁶ *Drey v. Watson* (C. C. A.; 1905) 71 C. C. A. 158, 138 Fed. 792.

¹⁷ *Cake v. Mohun* (1896) 164 U. S. 311, 41 L. ed. 447, 17 Sup. Ct. 100.

¹⁸ *Wilkinson v. Washington Trust Co.* (C. C. A.; 1900) 102 Fed. 28, 42 C. C. A. 141; *Drey v. Watson* (C. C. A.; 1905) 71 C. C. A. 158, 138 Fed. 792.

¹⁹ *Clark v. Brown* (C. C. A.; 1902) 57 C. C. A. 76, 119 Fed. 130.

²⁰ *Petersburg Sav. etc. Co. v. Dellatorre* (C. C. A.; 1895) 70 Fed. 643, 17 C. C. A. 310.

²¹ *Central Trust Co. v. Wabash etc. R. Co.* (1887) 32 Fed. 187.

²² *Cowdrey v. Railroad Co.* (1870) 1 Woods 381, Fed. Cas. No. 3,293.

²³ *Braman v. Farmers' Loan etc. Co.* (C. C. A.; 1902) 51 C. C. A. 644, 114 Fed. 18.

²⁴ *Weiss v. Haight & Freese Co.* (1906) 148 Fed. 399, 412.

offices of auditor and cashier, does not entitle him to additional compensation, though the expenses of conducting the business are thereby rendered much less. In reducing expenses to the lowest practicable and proper basis, the receiver does no more than he is under obligation to do.²⁵

The circumstance that the services of a railroad receiver were chiefly rendered in connection with the financing of the road and that he did not have anything to do with its management and operation supplies a good ground for refusing him any compensation in respect to the management of the road.²⁶ The non-resident receiver who does not have immediate charge of the receivership property and who leaves the executive management in other hands is not entitled to compensation as an active executive head.²⁷

It is a proper consideration in fixing the receiver's compensation that he has been well paid as manager and superintendent during the time he was acting as receiver.²⁸ So, after the duties of the receiver as manager have terminated and his responsibility as such has ceased, he may well be paid at a lower rate during the final winding up of the business.²⁹

§ 2781. Notice of Motion to Fix Receiver's Compensation.

As the allowance to a receiver by way of compensation for his service is not subject to the arbitrary determination of the court, the amount of it should be fixed by the court only after notice and upon a hearing, where the parties interested have an opportunity to contest the claim. It is reversible error for the court to pass upon this matter of its own motion, or upon the motion of the receiver, without notice to a party adversely interested.³⁰

§ 2782. Preliminary and Final Allowances to Receiver.

Though a court will, from time to time after the appointment of receiver, make proper interlocutory allowances by way of compensation for the service so far rendered by him, yet it should be

²⁵ *Farmers' Loan etc. Co. v. Central Railroad* (1881) 8 Fed. 60, 2 McCrary 318.

²⁶ *Braman v. Farmers' Loan etc. Trust Co.* (C. C. A.; 1902) 114 Fed. 18, 51 C. C. A. 644.

²⁷ *Central Trust Co. v. Cincinnati etc. R. Co.* (1892) 58 Fed. 500.

²⁸ *Williams v. Morgan* (1884) 111 U. S. 684, 28 L. ed. 559, 4 Sup. Ct. 638.

²⁹ *Boston Safe-Deposit etc. Co. v. Chamberlain* (C. C. A.; 1895) 66 Fed. 847, 14 C. C. A. 363.

³⁰ *Ruggles v. Patton* (C. C. A.; 1906) 74 C. C. A. 450, 143 Fed. 312; *Merchants' Bank v. Chrysler* (C. C. A.; 1895) 14 C. C. A. 444, 67 Fed. 388.

borne in mind that the right time for the final allowance of compensation is at the close of the receivership proceedings. Future contingencies and exigencies, and the character of future administration of the receivership cannot be foreseen in the earlier stages of the proceedings; and hence any final allowance, made before the receiver is practically through with his duties, is premature. The manner in which the receivership is conducted, and the diligence shown in expediting the case are proper elements to be considered in ultimately fixing the compensation, yet these factors cannot be known or appreciated until the case is nearing its end. In fixing the amount of the preliminary allowances or stated salary it has been said that a sound policy requires that such allowances shall be materially less than the value of the services rendered by the receiver prior to the making of such allowances. Such a practice inures to the benefit of creditors and stockholders through its tendency to secure a reasonably prompt settlement of the business and a consequent curtailment of expenses. Besides it furnishes a sort of security for the continued good behavior of the receiver. This practice is particularly desirable where the case is such as to be capable of and to require a speedy termination. The final allowance, made at the close of the receivership, should be so adjusted that the receiver will have fair and just compensation for his services as a whole, prior advances being taken into due consideration.³¹

§ 2783. Occasional Allowances Supplemental to Salary.

The salary granted to a receiver by the court is not infrequently supplemented by other allowances as the occasion and special nature of his services require.³² Thus, if the original salary granted appears to be inadequate or if the receiver is called upon to do things not contemplated when the salary was first determined, additional compensation should be granted. In one case a receiver of a railroad who voluntarily assumed to do the duties of superintendent was allowed pay for the services of superintendent in addition to the salary agreed upon for him as receiver.³³

If a receiver renders services and incurs expenses as receiver during the pendency of an appeal, the appellate court on sending the

³¹ *Maxwell v. Wilmington etc. Co.* 1900) 101 Fed. 933, 42 C. C. A. 91; (1897) 82 Fed. 214; *Merchants' Bank Easton v. Houston etc. R. Co.* (1889) *v. Crysler* (C. C. A.; 1895) 14 C. C. A. 40 Fed. 189.

³² *Farmers' Loan etc. Co. v. Central*

³³ *Dillingham v. Moran* (C. C. A.; R. of Iowa (1881) 8 Fed. 60.

cause back will reserve to him the right to apply to the lower court for compensation in respect to such services and expenses.³⁴

§ 2784. Compensation for Services Not Contemplated in Appointment.

The circumstance that a receiver may have agreed to do the duties of his office at a particular salary does not preclude him from receiving compensation for services not contemplated at the time of the appointment, nor does it prevent the court from giving additional compensation where the agreed amount appears quite inadequate; but such circumstance makes against increases of salary that are not clearly justifiable on the grounds stated.³⁵

§ 2785. Failure of Party to Question Amount of Salary in Due Time.

Where a receiver has been drawing a stated monthly salary by allowance of the court, an interested party who takes no proper steps to question the propriety of the allowance nor to bring the receivership to a close, cannot, after standing by for several years, compel the receiver to return any part of such salary, and this even though the receivership proceedings may appear to have been somewhat unduly prolonged.³⁶

§ 2786. Effect of Agreement to Waive Compensation.

If a receiver contracts a loan in his official capacity and, to secure it, agrees personally that he will not enforce any claim for commissions to the detriment of that obligation, but that the latter shall have precedence, such agreement does not prevent the receiver from receiving his proper commissions out of funds that are of a higher rank than that of the party making the advancement, since the latter could not in any event have recourse to such funds, and hence he is not prejudiced by allowing the commission.³⁷

§ 2787. Forfeiture of Compensation for Unfaithfulness.

Though a receiver may forfeit his right to any compensation whatever by misconduct or fraud in the administration of his trust, the court will not ordinarily visit such a penalty on him unless it is clearly shown that he acted with a corrupt purpose. But he may be

³⁴ *Montgomery v. Petersburg Sav. etc. Co.* (C. C. A.; 1895) 70 Fed. 746, 17 C. 1897) 81 Fed. 759, 26 C. C. A. 506.
C. A. 360.

³⁵ *Farmers' Loan etc. Co. v. Central Railroad* (1881) 8 Fed. 63.
³⁶ *Dillingham v. Moran* (C. C. A.; 1903) 120 Fed. 502, 56 C. C. A. 652.
³⁷ *Bloomfield v. Roy* (C. C. A.; 1903)

charged with particular items upon final accounting, or his improvident expenditures may be disallowed, wherever he has acted improperly and without due discretion. While error or mistake is thus sufficient to charge him on final account, only deliberate fraud will entirely disentitle him to compensation.³⁸

Removal of Receiver.

§ 2788. Circumstances Justifying Removal of Receiver.

As a receiver is chosen with a view to his fitness for the particular duties that are expected to devolve on him, the court of his appointment has the power to remove him and appoint another in his place whenever his unfitness for the particular duties connected with the receivership becomes apparent, or whenever it appears to be to the best interest of all concerned that a change should be made. The circumstance that a receiver has other interests hostile to the trust is sufficient to require his removal.³⁹ A receiver should be removed if he is shown to be under the control of other interests than those immediately concerned in the receivership.⁴⁰ So a receiver will be removed and superseded where it is made to appear that he was the nominee of one of two hostile parties and that his appointment was due to a mistaken belief that all the interests represented in the suit were united in him.⁴¹ But a receiver appointed to continue the business of a corporation will not be removed in order that another may be appointed merely because the holder of a small minority of the stock so desires, there being no showing of incompetency or of other disqualification in the actual incumbent of the office.⁴²

³⁸ *Farmers' Loan etc. Co. v. Central Co.* (1893) 58 Fed. 47; *Farmers' Loan Railroad* (1881) 8 Fed. 60, 65; See *etc. Co. v. Northern Pac. R. Co.* (1894) 61 Fed. 546; *Farmers' Loan etc. Co. v. Cowdrey v. Railroad Co.* (1870) 1 Woods 340.

³⁹ *Atkins v. Wabash etc. R. Co.* (1886) 29 Fed. 161; *State Trust Co. v. National Land etc. Co.* (1893) 72 Fed. 575.

⁴⁰ *Phinizy v. Augusta etc. R. Co.* (1893) 56 Fed. 273.

⁴¹ *Wood v. Oregon Development Co.* (1893) 55 Fed. 901.

⁴² *Land Title etc. Co. v. Asphalt Co.* (1902) 120 Fed. 996.

A fair idea of the considerations that control the court of equity in passing on an application for the removal of a receiver will be found in the following additional authorities: *Finance Co. v. Charleston etc. R. Co.* (1891) 45 Fed. 436; *Street v. Maryland Cent. R.*

A railroad receiver who is guilty of making intolerable discriminations as regards freight rates in favor of a particular shipper will be removed as unfit. *Handy v. Cleveland etc. R. Co.* (1887) 31 Fed. 689.

In *Meier v. Kansas Pac. R. Co.* (1878) 5 Dill. 476, Fed. Cas. No. 9,395, two persons representing two different sets of creditors of a railroad were appointed as receivers at the suggestion of the parties to the suit. Afterwards they got to quarreling. It appeared moreover that the double receivership

It is no ground for the removal of a railroad receiver that one of his many employees, agents, or servants is guilty of fraud and misconduct, unless the receiver is charged with complicity in such conduct or sanctions it after learning of the same. All that can be demanded of the receiver is the exercise of care in choosing his agents and diligence in looking after them and the business intrusted to them.⁴³

§ 2789. Application for Removal of Receiver.

The party making the application or motion for the removal of a receiver is required to make specific charges, and these must be supported by affidavits or other sufficient proof. The application is addressed to the sound discretion of the court; and if the latter considers that the charges are sufficiently specific and sufficiently grave in their nature to call for further consideration, the receiver will be required to answer. When the answer appears, the court has to determine whether the charges are sufficiently refuted to satisfy the court with respect to the integrity and competency of the officer.⁴⁴

A court of ancillary jurisdiction will not, except perhaps under extraordinary conditions, entertain a petition to remove the receiver on account of his misconduct. Such proceedings should be taken in the court of primary jurisdiction.⁴⁵

§ 2790. Sufficiency of Charges Contained in Application.

If the charges against a receiver are subject to criticism by reason of being indefinite and lacking in precision, the receiver nevertheless technically waives the objection by failing to take exception to them on this ground and by answering to the merits; but the circumstance that the charges are vague, uncertain, and general may properly be considered by the court in determining, in the light of the answer and proof, whether the situation is one that requires further investigation.⁴⁶

was expensive; that the two hostile receivers were a thousand miles apart, and that neither lived within two hundred miles of the road. Both receivers were removed and a single disinterested party living in the state where the road mainly lay was appointed receiver in their stead.

⁴³ *Clarke v. Central R. etc. Co.* (1893) 66 Fed. 16.

⁴⁴ *Farmers' Loan etc. Co. v. Northern Pac. R. Co.* (1894) 61 Fed. 546.

⁴⁵ *Chattanooga Terminal Ry. Co. v. Felton* (1895) 69 Fed. 273.

⁴⁶ *Farmers' Loan etc. Co. v. Northern Pac. R. Co.* (1894) 61 Fed. 546.

At the hearing of a motion to remove a receiver on grounds of mismanagement and for other reasons, the court looked over certain rebuttal affidavits that had been filed. It appeared that the matter was not properly in rebuttal, but was merely cumulative. The court

§ 2791. Burden of Proof.

A receiver will not be removed except upon a sufficient showing, and the burden is on the party seeking the removal. Unfitness, incompetence, or other good ground must be made to appear. Proof of a mere mistake or indiscretion, more obvious upon retrospection than at the time when the act is done, is not sufficient to justify a removal, especially where it is manifest that no fraud was intended.⁴⁷

§ 2792. Reference to Ascertain Truth of Charges against Receiver.

If the court is not fully satisfied upon the showing made by the respective parties, it may order a reference to take proof either generally touching all the charges of the petition, or in respect to any matters upon which the court desires further information. But such an order of reference is never a matter of course and will be made only when the court sees good reason for making it.⁴⁸

§ 2793. No Appeal by Receiver from Order of Removal.

The action of a court in removing a receiver and substituting another in his stead is an act of judicial discretion, and the receiver who is removed cannot appeal from the order.⁴⁹

Discharge of Receivership.

a. Interlocutory Discharge.

§ 2794. Temporary Character of Receivership Proceedings.

As the receivership is a purely auxiliary remedy and intended merely for the conservation of property pending the suit, it follows that a time must come in every such proceeding when the receiver must be discharged and the property surrendered or fund distributed to those entitled. It is the duty of every court of equity in which such a suit is pending to hasten the day when the receiver may be discharged and its own responsibility thereby ended. The continuation of a receivership for long periods of time is reprehensible and

observed that in any ordinary case such affidavits would be rejected, but inasmuch as the matter touched the conduct of an officer of the court, the affidavits might be given such attention as they seemed to deserve. *Fowler v. Jarvis-Conklin Mortg. Co.* (1894) 63 Fed. 888.

⁴⁷ *Fowler v. Jarvis-Conklin etc. Co.* (1894) 66 Fed. 14.

⁴⁸ *Farmers' Loan etc. Co. v. Northern Pac. R. Co.* (1894) 61 Fed. 546.

⁴⁹ *Bosworth v. St. Louis Terminal etc. Ass'n* (1899) 174 U. S. 182, 189, 43 L. ed. 941, 943; *Milwaukee etc. R. Co. v. Soutter* (1894) 154 U. S. 541, 17 L. ed. 604.

should not be allowed except under the pressure of absolute necessity.⁵⁰ In a case where a railroad company had been in the hands of a receiver for two years, the court thought fit to admonish the parties that if they should not, within a reasonable time, devise some means for ending the receivership, the court would take upon itself of its own motion to consider whether the receivership should not be dissolved.⁵¹ It is not bad practice for the court, upon granting an order for the appointment of a receiver, to make it a condition of the continuation of the receivership that the party prosecuting the suit shall speed the cause with diligence, and that in case of his failure to do so the court will of its own motion discharge the receiver.⁵²

Though the proceedings in a receivership cause should be advanced to a final termination with all reasonable speed, this object will not be permitted to lead the court to a precipitate action that might jeopardize the interests of the parties. Thus a court of equity has refused to order an immediate sale of a railroad in the hands of a receiver where such a transfer of the property would apparently, at that juncture, endanger the right of the road to subsidies granted by local bodies.⁵³

§ 2795. Interlocutory Order for Discharge of Receiver.

The order for the discharge of a receiver may be of an interlocutory nature, or it may be embodied in the decree finally disposing of the cause. Of necessity when the bill itself is dismissed for any reason or when the purpose of the receivership has been fully accomplished, the receiver will be discharged and the proceedings brought to a close. But it often happens that an order discharging the receiver is desirable and proper though the court may still retain the bill for the purpose of granting such relief as the plaintiff may be entitled to. An interlocutory order for the discharge of a receiver will be granted where it appears that he was improvidently appointed or that there is any other sufficient reason for his discharge.⁵⁴ Where, in the course of receivership proceedings, the fact is revealed that the suit was not

⁵⁰ *Milwaukee etc. R. Co. v. Soutter* (1864) 2 Wall. 510, 17 L. ed. 900.

⁵¹ *Platt v. Philadelphia etc. R. Co.* (1894) 65 Fed. 872.

⁵² See order of appointment in *Dow v. Memphis etc. R. Co.* (1884) 20 Fed. 284.

⁵³ *Bibber-White Co. v. White River Val. etc. Co.* (1901) 110 Fed. 473.

⁵⁴ *McHenry v. New York P. & O. R. Co.* (1885) 25 Fed. 114 (receiver discharged because it was not shown that the prop-

erty was in jeopardy or needed the protecting control of the court); *Walters v. Anglo-American Mortgage etc. Co.* (1892) 50 Fed. 316 (receiver discharged for general lack of merit in the bill).

If an injunction granted in the same cause appears to be a sufficient protection, the order appointing the receiver may be rescinded. *Ford v. Taylor* (1905) 137 Fed. 149.

bona fide brought by the plaintiff in order to assert a right of his own, but was collusively brought in pursuance of an understanding with the debtor and in order to prevent the latter from being harassed by other creditors, the court may, of its own motion, discharge the receiver.⁵⁵

§ 2796. Application for Discharge of Receiver.

To procure an order for the discharge of a receiver *pendente lite* or an order rescinding the act of appointment, the same procedure should be followed as in the case where an order is sought for the dissolution of a temporary injunction. The applicant should proceed by motion or petition, upon notice, and his application should be supported by affidavit, or affidavits, unless the cause for the discharge of the receiver sufficiently appears in the pleadings. The defendant usually puts in a sworn answer and uses the same with the effect of an affidavit at the hearing of the motion. The judge of the court may hear the motion to discharge the receiver at chambers.⁵⁶

§ 2797. Equitable Terms Incident to Discharge of Receiver.

As a condition of the granting of an order for the discharge of a receiver and the surrender of the property to the party from whom it was taken, the court has the power to impose equitable terms. It can, for instance, require the person to whom the property is delivered to execute a bond with good security conditioned for the performance of the terms of an agreement made with the plaintiff. Where such a bond has been given, the court has the power in the same suit to enter a decree on the bond against the surety as well as the principal.⁵⁷

Upon superseding an order appointing a receiver the court has the right and it is usually its duty to direct the receiver to restore the property in his hands to those from whom it was taken.⁵⁸

§ 2798. Restoration of Receivership.

Where a court discharges a receiver it may later reappoint him and authorize the same property to be retaken; but if, between the time of the surrender of the property and the order of reappointment,

⁵⁵ *Sage v. Memphis etc. R. Co.* (1883) (C. C. A.; 1903) 61 C. C. A. 288, 128 5 McCrary 643, 18 Fed. 571; *Brassey v. Fed.* 302.

New York etc. R. Co. (1884) 19 Fed. 663 (collusion not sufficiently shown). ⁵⁸ *In re Alexander McKenzie, Petitioner* (1901) 180 U. S. 551, 45 L. ed.

⁵⁶ *Walters v. Anglo-American Mortgage etc. Co.* (1892) 50 Fed. 316. 663; *Howard v. La Crosse & M. R. Co.* (1864) Fed. Cas. No. 6,760.

⁵⁷ *Twin City Power Co. v. Barrett*

another court has stepped in and appointed a receiver for the same property, and its receiver has taken possession, the court that surrendered the property cannot take it back after the reappointment, for the order of the appointment cannot be held to relate back so as to defeat the lawful possession of the second court.⁵⁹

§ 2799. Discretion of Court in Discharging Receiver—Appeal.

The action of the court in passing on an application for the discharge of a receiver is largely discretionary, and an appeal will not lie from an order discharging the receiver.⁶⁰ It is also true that an appeal will not generally lie from an order refusing to discharge a receiver. But it is not always so. The right of a party whose property is withheld to have it restored to him may be so clear as not to admit of doubt; and in such case, the receiver must be discharged, and the court has no discretion to refuse it. Thus in a suit to foreclose a railroad, the property had been put into the hands of a receiver. Subsequently the amount of the indebtedness was ascertained by a decree and the debtor, or a second mortgagee, came forward and asked for a discharge of the receivership, at the same time offering to pay all the indebtedness then due. It appeared that the balance subsequently to become due on the first mortgage debt was amply secured. Under these circumstances the court held that the discharge of the receiver was not discretionary, but was a right that must be granted.⁶¹

§ 2800. Discharge of Receiver Pending Suit against Him.

If a suit is brought against a receiver, the fact that he is discharged during the interval between the trial in the lower court and the hearing on appeal does not affect the validity of the judgment rendered against him in that cause.⁶²

b. Final Discharge of Receiver.

§ 2801. Effect of Final Discharge on Liability of Receiver.

After a receiver has been discharged by an order of the court and the property or fund held by him has been turned over and distributed to the person or persons entitled, no action will lie against

⁵⁹ *Shields v. Coleman* (1895) 157 U. S. 168, 39 L. ed. 660.

⁶⁰ An appeal will lie from an interlocutory order or decree appointing a receiver, but not from an order or decree discharging him. Act of April 14, 1906, ch. 1627, 34 Stat. L., 116.

⁶¹ *Milwaukee etc. R. Co. v. Soutter* (1864) 2 Wall. 609, 17 L. ed. 836.

⁶² *McCarley v. McGhee* (1901) 108 Fed. 494.

the receiver in respect of any liability incurred by him as receiver. The plaintiff who has failed to intervene and set up his claim pending the receivership proceedings must follow the property and seek relief against it in the hands of its possessor, provided the decree discharging the receiver reserves such right. If no such reservation is made in the decree, the party complaining is debarred of relief, unless the decree can be amended before the term is ended. After the expiration of the term it is too late to apply for such relief.⁶³ The order of discharge can only be vacated or amended on timely application.⁶⁴

§ 2802. Reservation in Favor of Claims Subsequently Established.

From what has just been stated it follows that in the order discharging a receiver and ordering the property to be turned over to the person entitled thereto, it is always highly important to embody therein a proviso to the effect that the person taking possession is to hold subject to any claims against the receiver that may be adjudicated by the court, and jurisdiction to adjudicate such claims should be expressly reserved; for it not infrequently happens that some claimant or other will turn up who, by some inadvertence or accident, failed to put in his claim against the receiver at the proper time, and it is not just that such persons should be entirely cut off from the right to reach the receivership property,—a result that usually follows unless some such reservation is made. Illustrations of the propriety of the practice in question are found in the following cases.

1. *Ohio Coal Co. v. Whitcomb* (C. C. A.; 1903) 59 C. C. A. 487, 123 Fed. 359: The decree in a receivership suit provided that the purchaser at the receivership sale should satisfy and discharge any unpaid indebtedness or liability of the receiver that had been incurred in the management and operation of the mortgaged premises on or after a stated date, and jurisdiction to carry out this part of the decree was reserved in the court. The property was then ordered to be turned over to the purchaser, which was done. Subsequently a proceeding was brought in the receivership cause to ascertain and liquidate a claim that had accrued pending the receivership. It was held that the proceeding was proper. As to such claim the receivership cause was still pending, and the circumstance

⁶³ *Farmers' Loan etc. Co. v. Central R. Co.* (1890) 7 Fed. 537; *Davis v. Dun-* lien antedating the receivership. *Massachusetts Mut. L. Ins. Co. v. Chicago* etc. R. Co. (1882) 13 Fed. 857, 861, can (1884) 19 Fed. 477.

Where a receiver has been discharged and the property surrendered to a purchaser at the receiver's sale, the receiver is not a necessary party to a suit against the purchaser, or one claiming under the purchaser, to enforce a

⁶⁴ *Western New York etc. R. Co. v. Penn Refining Co.* (C. C. A.; 1905) 70 C. C. A. 23. 137 Fed. 343.

that the active receivership was terminated and that the property had been turned over to the purchaser, was immaterial.

2. *American Bonding etc. Co. v. Baltimore etc. R. Co.* (C. C. A.; 1903) 60 C. C. A. 52, 124 Fed. 866: A receiver had, with the sanction of the court, entered into a contract with a third person for improvements to be made by the latter on the property in the hands of the receiver, and the contractor gave bond with sureties to do the work. The property was sold, and in its decree confirming the sale and directing the property to be delivered to the purchaser, the court ordered the purchaser and his subvendee, being also the assignee of the contract, to carry out and perform that contract, the same being then unfinished. The court also reserved the power to enforce compliance with this order and, to this end, to retake and resell the property. The assignee duly proceeded with performance. The contractor, however, threw up his job. It was held that the assignee could maintain an action against the sureties on the bond.

3. *Baltimore etc. R. Co. v. Burris* (C. C. A.; 1901) 50 C. C. A. 48, 111 Fed. 882: A company that had been in the hands of a receiver was permitted to resume possession and control of its properties on condition that it should assume and satisfy all the obligations and liabilities of the receiver. It was held that an action for personal injury inflicted while the road was in the hands of the receiver, but which action was not brought till the company had resumed possession, should be brought against the company and not against the receiver. The proceeding in this case was by means of an intervening petition against the company, and no proof of the conditional order of the court was offered. But it was held that the court could take judicial knowledge of it without proof, such order having been entered in the main suit to which this was ancillary.

§ 2803. Implied Assumption of Obligation by Successor.

As is indicated above, it is a general rule that one who has a claim or right of action against a receiver in his official capacity and growing out of his management of the property while in his hands cannot ordinarily enforce such claim in a personal action against the individual or corporation who succeeds to the property when the receiver has been discharged, unless the court has expressly fixed the obligation upon such successor as a condition of his right to acquire the property. There is one situation, however, where the courts have permitted an obligation accruing against the receiver to be enforced in a personal action at law against the successor, and this upon the idea of an implied assumpsit on the part of the successor to satisfy the obligation. The case in which this notion obtained recognition was of the following nature: A railroad had been in the hands of a receiver, but the receiver had been discharged and the property returned to the railroad company, upon its own procurement, or at least with its consent and acquiescence. While the road was in the hands of the receiver large sums were expended by him in improvements and new equipment, so that the road, when returned to the company, was in a far

more valuable condition than before. After the company had regained possession, an action was brought against it for damages incurred by the plaintiff by reason of the negligent operation of the road while in the hands of the receiver. It was held that, though the cause of action was primarily one against the receiver, a suit could be maintained upon such cause of action against the company itself. By accepting the restoration of the road, largely increased in value by the betterments, the company was held to have assumed such valid claims against the receiver as were not satisfied by him or by the court that discharged him; but it was intimated that the company could not be held liable to an extent greater than the value of the betterments in question. The court pointed out that if this had been a controversy between a party whose claim originated while the road was in the control of the receiver and a purchaser at the judicial sale, the action could not have been maintained, unless the decree of sale had expressly charged the purchaser with liability in respect to such claim.⁶⁵

Receiver's Right of Appeal in Receivership Cause.

§ 2804. Appeal from Order or Decree Affecting Receiver Personally.

The receiver's right of appeal from orders or decrees made in the receivership proceedings depends on the nature of the order or decree and on the manner in which it affects the receiver and the other parties. The relation between the court and the receiver is of a peculiar nature, and the receiver cannot as a matter of course appeal from any and every order or decree the court sees fit to make. If an order or decree touches the receiver in his personal rights, and the order is not one exclusively within the discretion of the court, the receiver undoubtedly has the right to appeal. For instance, if the court refuses to allow him commissions or fees, or if at final settlement the court charges him with a particular sum of money and directs it to be paid into the court, the receiver can appeal.⁶⁶ But if the order is altogether discretionary, the receiver cannot appeal, though the order affects him personally. Thus it is settled that the receiver cannot appeal from an order discharging or removing him from the receivership.⁶⁷

⁶⁵ *Texas etc. R. Co. v. Bloom* (1897) disallowing commission); *Hinckley v. 164 U. S. 636*, 41 L. ed. 580, 17 Sup. Ct. *Gilman etc. R. Co.* (1876) 94 U. S. 467, 216, (1894) 9 C. C. A. 300, 60 Fed. 979; 24 L. ed. 106 (order charging receiver *Texas etc. R. Co. v. Johnson* (1894) 151 with a particular sum of money appealable). U. S. 81, 38 L. ed. 81.

⁶⁶ *Bosworth v. St. Louis Terminal etc. Assoc.* (1899) 174 U. S. 189, 43 L. ed. 943 (receiver may appeal from order ⁶⁷ See *Bosworth v. St. Louis Terminal etc. Ass'n* (1899) 174 U. S. 187, 43 L. ed. 943.

§ 2805. Appeal from Decree Affecting Rights of Parties.

It is a rule that the receiver cannot appeal from an order or decree distributing burdens or apportioning rights between the parties to the suit, or distributing the receivership estate among the parties according to their respective interests as decreed by the court. The receiver occupies a position of subordination to the court of his appointment. He is, as is aptly said, merely the hand of the court; and consequently he is devoid of any right, discretion, or authority to dispute an order or decree adjudicating the respective rights of the different parties. In his trust capacity the receiver represents all of the parties, and consequently he is not permitted to become the protagonist of any one as against the other.⁶⁸ So far as concerns the rights of the parties *inter sese*, each must be left to look out for himself.

§ 2806. Appeal from Decree Affecting Trust Estate.

On the other hand, the receiver is allowed to appeal from any order or decree by which the trust fund is depleted or by which any part of it is decreed to a stranger or persons other than those who are parties to the suit and interested as beneficiaries in the trust fund. The receiver, in his official capacity, is the protector of the entire estate, and he is representative of all the beneficiaries who are before the court. It is therefore his duty to protect the trust estate from the claims of strangers. Of course strangers to the suit cannot get into a receivership cause in order to assert a right or claim to the fund, except by means of a petition of intervention; and the principle now under consideration therefore resolves itself into the rule that the receiver, in behalf of the true parties to the suit, can combat the claim of an intervening petitioner, and if the court allows the claim, the receiver may take an appeal. The claim of such an intervener is antagonistic to the interests of the parties to the suit, and the receiver is a proper person to protect the trust estate against it. The fact that the actual parties may also contest such a claim does not deprive the receiver of the authority or relieve him of the duty to see that the estate is not subjected to an improper charge. It has been held that where the receiver has a right to question the propriety of allowing a claim, his right of appeal does not terminate when the property is taken out of his possession and returned to the control of one of the

⁶⁸ *Bosworth v. St. Louis Terminal etc. Ass'n* (1899) 174 U. S. 182, 43 L. ed. 943.

parties, if any fund or security is retained by the court for the satisfaction of the claim.⁶⁹

A receiver who desires to take an appeal is not required to procure a formal order granting him leave to do so. The mere granting of the appeal, as in case of other suitors, involves the granting of leave to appeal.⁷⁰

Action on Receiver's Bond.

§ 2807. Liability on Bond Unaffected by Irregularities in Receivership Cause.

The validity of a receiver's bond and the liability of the receiver and his sureties thereon are in no wise affected by the circumstance that the appointment of the receiver was improvident or improper, or that the proceedings were irregular. Nay, though the court should afterwards dismiss the bill and discharge the receiver on the ground of a lack of jurisdiction, the bond given by the receiver may still be enforced. All the rights that the receiver has are derived from the court, and his possession is the possession of the court. Hence he and his sureties are estopped from denying the jurisdiction of the court.⁷¹

§ 2808. Proceedings to Enforce Receiver's Bond.

There is some difference of opinion as to the mode of proceeding by which liability on a receiver's bond should be enforced, and the same question has here arisen as was considered in connection with the discussion of the mode of proceeding on injunction bonds.⁷² It has sometimes been considered that the liability of the sureties on a receiver's bond is enforceable only in an independent action at law.⁷³ But upon reason and principle it would appear that the practice in this regard may very well be made to conform with the practice which prevails in regard to the enforcement of injunction bonds. In connection with the treatment of that subject, we learned that formerly the rule in the federal courts was that an injunction bond could be

⁶⁹ *Bosworth v. St. Louis Terminal etc. Assn.* (1899) 174 U. S. 182, 43 L. ed. 941. 39 C. C. A. 132, 98 Fed. 499. It was held to be erroneous for the court of equity appointing a receiver to give judgment against the surety on his bond; but as to the receiver himself it was held that inasmuch as he had had full notice of all the proceedings, and had appeared and controverted his liability, the decree against him on the bond was proper.

⁷⁰ *Farlow v. Kelly* (1881) 131 U. S. 201, Appx., and 26 L. ed. 427.

⁷¹ *Baltimore Building etc. Ass'n v. Alderson* (C. C. A.; 1900) 99 Fed. 489, 39 C. C. A. 609.

⁷² See *ante*, §§ 2420, 2421.

⁷³ *Kirker v. Owings* (C. C. A.; 1899)

enforced only in an independent legal action at law, but this practice has been finally abandoned and the doctrine now is that the court of equity which requires the bond to be given may, in its discretion, assess the damages on the bond, referring the cause to a master for that purpose, if need be; or if the court sees fit, it may remit the party to his action at law on the bond.⁷⁴ The same considerations of convenience, as well perhaps as of strict justice, that make it proper for the court of equity to assess the damages on an injunction bond also require that a receiver's bond should likewise be enforceable in the court of equity and in the same suit in which the bond is given. In accordance with this view it has been held that where a bond is required as a condition of the discharge of a receiver, it is enforceable by the court of equity in the same suit. If a court has inherent power to require and take a bond, it also has as a necessary consequence the power to enforce the bond.⁷⁵

However, in view of the diversity of opinion on the point as to whether the receiver's bond is enforceable in the court of equity and in the proceedings in the same cause in which the bond was given, it is desirable that when an order is entered requiring the giving of a bond by the receiver, a provision should be incorporated expressly reserving to the court in that cause the power to give judgment on the bond against both principal and surety.⁷⁶

⁷⁴ See *ante*, § 2421.

⁷⁵ See the form of the order in *Cake*

⁷⁶ *Twin City Power Co. v. Barrett v. Mohun* (1896) 164 U. S. 311, 312, 41 (C. C. A.; 1903) 61 C. C. A. 288, 126 L. ed. 447, 448. Fed. 302.

CHAPTER LXVIII.

FORECLOSURE PROCEEDINGS.

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General Principles.

§ 2809. Scope of Present Chapter.

In this and the succeeding chapter it is our purpose to discuss such topics connected with the foreclosure of mortgages as appear to have more particular reference to proceedings in the federal courts and such related matters as may be necessary to make those topics in some degree intelligible and consistent. A detailed treatment of the subject of mortgage foreclosure, in its wider bearings, is not desirable and does not comport with the scope of this work. The foreclosure of mortgages is not inappropriately dealt with, as here, in juxtaposition with the subject of receivers, for the receivership proceeding is very commonly a mere incident of a foreclosure suit.

§ 2810. Object of Foreclosure Proceedings.

Originally the object of the foreclosure suit was to foreclose or cut off the equity of redemption of the mortgagor in the mortgaged premises, and this idea is still in some degree involved in the proceeding. However, under the theory of the mortgage now generally prevailing in this country, the mortgage is considered as a mere equitable lien on the premises for the security of the mortgage debt, and in this view the bill to foreclose is merely a proceeding to enforce the mortgage lien, by a sale of the premises, in order that the creditor may get his money, interest, and the expense incident to the suit. The term "foreclosure," in this connection, has therefore come to be a sort of misnomer, as the object of the suit is to enforce the mortgage lien, and not, as formerly, to foreclose the equity of redemption.¹

¹ See 3 Pom. Eq. Jur. (3d ed.) § 1228.

§ 2811. Nature of Foreclosure Suit.

A foreclosure proceeding has sometimes been considered to be partly in the nature of an action *in rem* and partly in the nature of an action *in personam*, because, as ordinarily prosecuted, the purpose of the proceeding is to procure a seizure and sale of the property and a personal judgment against the debtor for any balance remaining due after the proceeds of the property have been applied to the debt.² However, it cannot be said that a foreclosure suit is a proceeding *in rem*, in a technical sense. Such a suit does not purport to summon or invite, by notice or otherwise, all the world to come in, so far as there are any adverse interests; and of course the adjudication in such a suit does not conclude strangers.³

§ 2812. Jurisdiction of Federal Court in Foreclosure Suit.

If the requisite diversity of citizenship exists,⁴ or other condition is present which brings the case within the statutory jurisdiction of the court,⁵ the federal court will entertain jurisdiction of a suit to foreclose a mortgage to the same extent as it will entertain jurisdiction of any other cause of equitable cognizance. The general jurisdiction of the court of equity to entertain a bill for the foreclosure of mortgages is merely a manifestation of its power to enforce liens of all kinds; and the bill to foreclose a mortgage differs in no material particular from a bill to enforce any other lien.⁶

§ 2813. Same—Effect of State Laws.

The jurisdiction of the federal court of equity to entertain a foreclosure proceeding is not in any degree impaired by the existence of a state statute abolishing the proceeding in equity as the means of foreclosing a mortgage and establishing some other adequate remedy under the state law. The jurisdiction of the federal court rests upon the authority conferred by the statutes of the United States, and it is not subject to limitation or control by state laws.⁷ Hence, the exist-

² *Martin v. Pond* (1887) 30 Fed. 15, 17. (district court has jurisdiction to entertain foreclosure suit against consul accredited to this country from a foreign government).

³ *Pardes v. Aldridge* (1903) 189 U. S. 433, 47 L. ed. 886.

⁴ *Connecticut Mut. Life Ins. Co. v. Crawford* (1884) 21 Fed. 281; *Winchell v. Carll* (1885) 24 Fed. 855; *Mangels v. Brewing Co.* (1892) 53 Fed. 513.

⁵ *Pooley v. Luce* (1896) 76 Fed. 146

⁶ *Gibson, Suits in Chan.* (2d ed.) §§ 1036-1041.

⁷ *Ray v. Tatum* (C. C. A.; 1896) 72 Fed. 112, 18 C. C. A. 464.

ence of the distinct statutory state remedy does not affect the right to foreclose in a federal court of equity.⁸

§ 2814. Same—Enforcement of State Remedy in Federal Court.

A statutory method for the foreclosure of mortgages, recognized by state law, can be pursued in a federal court sitting in the state where the particular statutory method is available and in the state where the property covered by the mortgage is situated. Thus in a state where the mortgagee can bring an action of ejectment at law against the mortgagor after condition broken, such remedy may be resorted to in the federal court of law;⁹ and similarly the method of foreclosure by scire facias is available in the federal court, where such method is recognized by the statutes of the state.¹⁰

§ 2815. Same—Existence of Cumulative Remedy.

It is a general rule that the existence of a cumulative remedy of any kind does not prejudice the right of a mortgagee to resort to a foreclosure in equity.¹¹ Where there are two or more methods of foreclosure available, the mortgagee or trustee may elect to pursue either to the exclusion of the other.¹² A mortgagee may adopt any available remedy secured to him by law or by the contract. Thus he may sue at law on the mortgage debt or may bring ejectment for the land (where the mortgage has vested the legal title in him), or he may enter and take possession, and yet his right to foreclose in equity will not be thereby affected.¹³ That a mortgage or deed of trust contains a power of sale under which the property can be sold without resorting to a judicial proceeding does not prevent the mortgagee, or other interested person, from filing a bill in equity to foreclose, if he so prefers.¹⁴

The fact that a party secured by a mortgage has other security that can be subjected to the mortgage debt, does not stand in the way of foreclosure proceedings. A person who has several securities may

⁸ *Benjamin v. Cavaroe* (1875) 2 Woods 168, Fed. Cas. No. 1,300. ⁹ *Groarty* (1890) 136 U. S. 237, 34 L. ed. 346.

¹⁰ *Whiting v. Wellington* (1882) 10 Fed. 810. ¹¹ *Morrison v. Buckner* (1843) Fed. Cas. No. 9,844.

¹² *Black v. Black* (1896) 74 Fed. 978. ¹³ *Howell v. Western R. Co.* (1876) 94 U. S. 466, 24 L. ed. 256; *Chicago etc. R. Co. v. Fosdick* (1882) 106 U. S. 47, 27 L. ed. 47; *New York Security etc. Co. v. Lincoln St. R. Co.* (1896) 74 Fed. 67; *Beekman v. Hudson River etc. R. Co.* (1888) 35 Fed. 3; *Alexander v. Central R. Co.* (1874) 3 Dill. 487.

¹⁴ *Dow v. Memphis etc. R. Co.* (1884) 20 Fed. 260; *Furbish v. Sears* (1865) Fed. Cas. No. 5,160.

¹⁵ *Gordon v. Gilfoil* (1878) 99 U. S. 168, 25 L. ed. 383. See *Morris v. Lindauer* (C. C. A.; 1893) 54 Fed. 23, 4 C. C. A. 162; *Smith Purifier Co. v. Mc-*

resort to either.¹⁵ Similarly, the fact that the trustee in a railroad mortgage has a right, upon default, to take possession and operate the road does not prevent a foreclosure.¹⁶

The pendency of an action at law on a note secured by mortgage is no impediment to the maintenance of a suit to foreclose the mortgage.¹⁷ And the reduction of the note to judgment has no more effect.¹⁸ The pendency of an action of ejectment at the suit of the mortgagee to recover the premises included in the mortgage is no obstacle to a suit to foreclose. The rule is the same whether the instrument shows its character as a mortgage on its face or is in form a straight deed with a parol defeasance.¹⁹

§ 2816. Same—Pendency of Suit in State Court.

The pendency in a state court of a suit brought by the trustee to foreclose a mortgage is no bar to a similar suit brought in a federal court, on the same mortgage, by the bondholder or other beneficiary;²⁰ and the fact that the state court, in the cause there pending, has granted an injunction against the foreclosure is not material on the question of the right of the federal court to entertain the proceeding brought in such court.²¹ The institution of executory proceedings in a court of Louisiana upon a mortgage executed in that state and the granting of an order of seizure and sale in such proceedings do not affect the right of the federal court to entertain a foreclosure suit on the same mortgage.²²

The fact that a debtor makes an assignment for the benefit of creditors and that the state court assumes jurisdiction to carry the assignment into effect under the state law does not defeat the power of the federal court to foreclose a mortgage covering the property conveyed by the assignment. In such case the assignee under the deed of assignment is not in the position of a receiver, and his taking possession does not exclude the federal court from the exercise of juris-

¹⁵ *Muller v. Dows* (1876) 94 U. S. 24 L. ed. 737; *Beekman v. Hudson River etc. R. Co.* (1888) 35 Fed. 10; *Weaver v. Field* (1883) 16 Fed. 22; *Liggett v. Glenn* (C. C. A. 1892) 51 Fed. 381, 2

(1874) Fed. Cas. No. 166. ¹⁷ *Ober v. Gallagher* (1876) 93 U. S. 199, 23 L. ed. 829. ¹⁸ *Connecticut Mut. Life Ins. Co. v. Jones* (1890) 8 Fed. 303.

¹⁹ *Hughes v. Edwards* (1824) 9 Wheat. 489, 6 L. ed. 142. ²⁰ *Stanton v. Embrey* (1876) 93 U. S. 548, 23 L. ed. 983; *Insurance Co. v. Brune's Assignee* (1877) 96 U. S. 588, (1875) 2 Woods 168.

²¹ *Woodbury v. Alleghany etc. R. Co.* (1895) 72 Fed. 371, 374. ²² *Gordon v. Gilfoil* (1878) 99 U. S. 168, 25 L. ed. 383; *Benjamin v. Cavaros*

diction over the same property. The assignee is selected by the debtor, not by the court, and he takes the estate subject to the mortgage lien and subject to the right of the mortgagee to foreclose.²³

§ 2817. State Laws Determining Rights of Parties.

While it is true, as previously stated,²⁴ that the jurisdiction of the federal court to entertain a foreclosure proceeding cannot be impaired or taken away by a state statute, it is nevertheless also true that the rights of the parties under a mortgage are determined, as a rule, not only by the terms of the mortgage itself but also by the law of the state where the mortgaged property is located. It follows that in so far as the state statutes create, establish, or define rights under the mortgage, such laws must be given effect in the federal court.²⁵ For instance, the local statutes of limitations of the several states are given effect in foreclosure suits in the federal courts, as determining the rights of the parties under the mortgage.²⁶

§ 2818. Practice of Federal Courts as Affected by State Laws.

While it is not within the power of a state legislature directly to control or determine the practice of the federal court in the exercise of any of its proper and legitimate powers, it is nevertheless true that the federal courts, in determining their own practice as to the foreclosure of mortgages, will so order proceedings as to secure and perfect rights given by the state statute; and it is the duty of federal courts, in making rules for their own guidance, to adjust their practice to that of the state, so far as may be necessary to secure rights existing under the state law in regard to the foreclosure of mortgages.²⁷ But noncompliance with a local law in regard to the time

²³ *Edwards v. Hill* (C. C. A.; 1894) 50 Fed. 723, 8 C. C. A. 233.

²⁴ See, *ante*, § 2813.

²⁵ *Dow v. Memphis etc. R. Co.* (1884) 20 Fed. 260; *Hill v. Hite* (C. C. A.; 1898) 85 Fed. 268, 20 C. C. A. 549, *affirming* (1897) 79 Fed. 826; *American Loan etc. Co. v. Union Depot Co.* (1897) 80 Fed. 36; *Knickerbocker Trust Co. v. Penacook Mfg. Co.* (1900) 100 Fed. 814; *Ruggles v. Southern Minnesota R. Co.* (1872) Fed. Cas. No. 12,121; *Samuel v. Holladay* (1869) Fed. Cas. No. 12,238. See *Hammock v. Loan & Trust Co.* (1881) 105 U. S. 77, 26 L. ed. 1111; *American Loan & T. Co. v. Union Depot Co.* (1897) 80 Fed. 36, 40.

See also *post*, § 2873.

For a consideration of the effect of a local statute on the venue of a foreclosure suit, see *Stevens v. Ferry* (1891) 48 Fed. 7.

A state law granting a stay in proceedings to foreclose by scire facias under the statute has no application to proceedings to foreclose by action. *Woodbury v. Allegheny etc. R. Co.* (1895) 72 Fed. 371.

²⁶ See *post*, § 2847.

²⁷ *Connecticut Mut. L. Ins. Co. v. Crawford* (1884) 21 Fed. 282; *Knickerbocker Trust Co. v. Penacook Mfg. Co.* (1900) 100 Fed. 814.

See also, *post*, § 2873.

of sale is not a ground for avoiding foreclosure proceedings in another suit.²⁸

A provision of a state statute in regard to procedure will not be permitted to dispense with any fundamental principle of federal equity practice. Thus an order of confirmation is indispensable to the validity of a sale made in foreclosure proceedings in a federal court, though the state statute dispenses with the necessity for a confirmation and gives to the officer making the sale full authority to adjudicate the title to the purchaser.²⁹

A rule established by the decisions of the state court on a question of general commercial law affecting the enforcement of a mortgage, which rule is in contravention of the doctrine established in the federal courts, will not be recognized.³⁰

§ 2819. Existence of Subject-Matter as Affecting Right to Maintain Bill.

A bill of foreclosure will not lie where the subject-matter of the mortgage has ceased to exist, and an intangible right, which can be dealt with only in connection with a real and tangible thing, cannot be foreclosed where the thing with which it is inseparably associated cannot be dealt with or affected by the decree of the court. For instance, the good will of a business cannot be foreclosed where the business and everything else with which the good will was associated are either out of existence or dissipated.³¹

§ 2820. Necessity for Foreclosure Proceedings.

Where there are many holders of bonds secured by mortgage, the proper remedy, when a default occurs, is by bill to foreclose. If one holder sues at law and obtains judgment it will profit him little, for he will not be permitted to levy execution and sell any of the mortgaged property to the detriment of others having equal or better rights than himself.³² A mortgagee cannot, upon a judgment recovered for a debt secured by his mortgage, levy the execution upon the mortgaged property.³³

²⁸ *Andrews v. National etc. Works* affirmed on ground of laches (1893) 149 (C. C. A.; 1896) 76 Fed. 166, 36 L.R.A. U. S. 436, 37 L. ed. 799, 13 Sup. Ct. 944.
²⁹ 130, 22 C. C. A. 110 (1897) 77 Fed. 774, ³² *Pennock v. Coe* (1859) 23 How.
²³ C. C. A. 453, 36 L.R.A. 153. 117, 16 L. ed. 436; *Hackettstown Nat.*
²⁹ *Nalle v. Young* (1896) 160 U. S. Bank v. *Brewing Co.* (C. C. A.; 1896)
624, 40 L. ed. 560, 16 Sup. Ct. 420. 74 Fed. 110, 20 C. C. A. 327.
³⁰ *Swett v. Stark* (1887) 31 Fed. 858. ³³ *Pugh v. Fairmont Min. Co.* (1884)
³¹ *Metropolitan Nat. Bank v. St. Louis Dispatch Co.* (1888) 36 Fed. 722, 112 U. S. 243, 28 L. ed. 686.

*Right to Foreclose and Conditions Incident to Same.***§ 2821. Restrictions on Right to Foreclose—How Interpreted.**

The remedy by bill of foreclosure is favored in equity, and provisions in a deed of trust or mortgage restrictive of the right of the creditor or trustee to file such a bill are strictly construed.³⁴ Such restrictions are not to be extended by implication. Thus if there is a condition that the trustee shall only take action upon a request from a majority of the bondholders, and this condition can be construed as referring primarily to his taking of actual possession under the trust deed, or to the making of a sale under the power contained therein, it will not be construed, by implication, as a restriction on the trustee's right to file a bill of foreclosure.³⁵

Morgan's Steamship Co. v. Texas Central R. Co. (1890) 137 U. S. 171, 34 L. ed. 625: The condition was that on default continuing for sixty days in the payment of interest or any part of principal, the principal of the bonds should become immediately due, and that upon request of seventy-five per cent of the holders of bonds, and written notice of the same, the trustee should take possession of the property, and operate it for the benefit of the bondholders, and that upon like request he should proceed to foreclose the mortgage and sell the property to the highest bidder for cash. It was also provided that nothing contained in the instrument should be construed to prevent or interfere with the foreclosure by any court of competent jurisdiction. It was held that the trustee could maintain a bill to foreclose the mortgage upon occurrence of a default, without averring or proving a request of seventy-five per cent of the bondholders, as such request was necessary only in case the trustee wished to proceed to foreclose or take possession *ex mero motu* without the intervention of a court.

§ 2822. Same—Request of Bondholders as Condition Precedent.

However, if a provision requiring the trustee to proceed only upon request of a certain per cent of the bondholders is directed expressly

³⁴ *Land Title etc. Co. v. Asphalt Co.* (1874) 3 Dill. 487; *Credit Co. v. Arkansas Cent. R. Co.* (1882) 15 Fed. 46; *Central Trust Co. v. Texas etc. R. Co.* (1885) 23 Fed. 846; *Farmers' Loan etc. Co. v. Winona etc. R. Co.* (1893) 89 Fed. 957; *Mercantile Trust Co. v. Chicago etc. R. Co.* (1893) 61 Fed. 373; *Toler v. East Tennessee etc. R. Co.* (1894) 67 Fed. 168. Compare *New York Security etc. Co. v. Lincoln etc. R. Co.* (1896) 74 Fed. 67 (1896) 77 Fed. 527.

The course of procedure prescribed in the mortgage as proper to be followed by the trustee in conducting a sale under the power will not be construed as referring to the procedure in a foreclosure suit. *Farmers' Loan etc. Co. v. Green Bay etc. R. Co.* (1881) 6 Fed. 100, 105.

³⁵ *Guaranty Trust etc. Co. v. Green Cove etc. Co.* (1891) 139 U. S. 137, 35 L. ed. 116; *Alexander v. Central R. Co.*

A provision that the trustee may sell after default for six months provided the president of the mortgagor has previously been served with notice of the default does not apply in a suit by the

to the matter of bringing a suit to foreclose, it will be given effect; and a bill brought by the trustee to foreclose must allege that the required number of bondholders have requested him to bring the suit.³⁶

§ 2823. Same--Restriction Tending to Oust Jurisdiction of Court.

The right to foreclose in equity is not taken away by a provision to the effect that neither the whole nor any part of the mortgaged premises shall be sold under proceedings either at law or in equity, the intention being that the mode of sale by the trustee prescribed in the mortgage should be exclusive. Such a clause is void as tending to oust the ordinary jurisdiction of the courts.³⁷

§ 2824. Various Conditions Affecting Right to Foreclose.

The right of foreclosure on account of the insolvency of a debtor corporation is not defeated by the fact that the corporation has the right to make calls on its stockholders, by which proceeding funds could be obtained to pay the indebtedness.³⁸ The same is true of a provision giving a power of sale.³⁹

The right to foreclose a mortgage securing convertible bonds on notes is not affected, or lost, where the holder makes a conditional agreement to convert them into stock but the conversion fails to take place because the condition is not complied with.⁴⁰

§ 2825. Default as Condition Precedent to Suit.

A bill to foreclose a mortgage will lie only where there has been a breach of the condition of the mortgage.⁴¹ If no time for payment is mentioned in the mortgage and the debt is already due and payable, foreclosure may be had forthwith and at any time.⁴² A default in the payment of interest is a default in the payment of the debt, interest when due being treated as principal.⁴³

trustee to foreclose. *Robinson v. Alabama etc. Mfg. Co.* (1891) 48 Fed. 12 (1893; C. C. A.) 56 Fed. 690, 6 C. C. A. 79.

³⁶ *Chicago etc. R. Co. v. Fosdick* (1882) 106 U. S. 47, 77, 27 L. ed. 47, 58.

³⁷ *Guaranty Trust etc. Co. v. Green Cove etc. R. Co.* (1891) 139 U. S. 137, 35 L. ed. 116, 11 Sup. Ct. 512.

³⁸ *Land Title etc. Co. v. Asphalt Co.* (C. C. A.; 1903) 127 Fed. 1, 62 C. C. A. 23.

³⁹ *Hall v. Sullivan R. Co.* (1857) Fed. Cas. No. 5,948.

⁴⁰ *Pugh v. Fairmont Gold etc. Mining Co.* (1884) 112 U. S. 238, 28 L. ed. 684.

⁴¹ *Hampton v. Phipps* (1883) 108 U. S. 260, 27 L. ed. 719.

⁴² *Wright v. Shumway* (1853) 1 Biss. 23, Fed. Cas. No. 18,093.

⁴³ *Pennsylvania Co. v. Philadelphia etc. R. Co.* (1895) 69 Fed. 482; *New York Security etc. Trust Co. v. Lincoln etc. R. Co.* (1896) 74 Fed. 67.

§ 2826. Acceleration of Maturity of Debt.

A provision in a mortgage to the effect that the whole debt shall become due, or may be treated as due, upon default in the payment of interest or of a single instalment, will be given effect; and the whole debt may be foreclosed, including future instalments, if the creditor elects to treat the whole as due.⁴⁴ Such a provision is not treated as being a contract for a penalty against which equity will relieve.⁴⁵ But a court of equity will not countenance or give effect to a provision accelerating the maturity of the whole debt upon failure to pay interest or a single instalment where the creditor by trickery or stratagem has brought on the technical condition upon which he exercises the right. His purpose must be open and honest, and advantage cannot be taken of any misleading conduct on his own part.⁴⁶

The right to have the whole debt declared due upon default in the payment of an instalment of the debt or interest, will not be declared to exist on inference only. Such a provision must be express.⁴⁷

A covenant or stipulation that the payee of the notes secured by a mortgage may treat the whole debt as due upon default in the payment of the interest, passes to a purchaser of the notes and mortgage, and the option may be exercised by him to the same extent as by the original payee.⁴⁸

§ 2827. Same—Written Demand for Payment.

In order to make a default effective for the purposes of foreclosure it is not infrequently required that a demand in writing shall be made for the payment of the debt, instalment, or interest, as the case may be.⁴⁹

§ 2828. Trustee's Discretion as to Declaring Debt Due.

A trustee who is clothed with a discretion, under certain contingencies, to declare the whole mortgage debt due, should act upon an honest and disinterested judgment. His discretion in this, as in

⁴⁴ *Noonan v. Braley* (1863) 2 Black 499, 17 L. ed. 278.

In *American Loan etc. Co. v. Union Depot Co.* (1897) 80 Fed. 36, there was a provision in the mortgage that foreclosure could be had upon default in payment of interest and that the whole debt should be considered as mature at the time of the completion of the sale.

⁴⁵ *Ruggles v. Southern etc. R. Co.* (1872) Fed. Cas. No. 12,121.

⁴⁶ *Union Mut. L. Ins. Co. v. Union Mills Plaster Co.* (1889) 37 Fed. 289.

⁴⁷ *Grape Creek etc. Co. v. Farmers' Loan etc. Co.* (C. C. A.; 1894) 12 C. C. A. 350, 63 Fed. 895.

⁴⁸ *Swett v. Stark* (1887) 31 Fed. 858.

⁴⁹ As to what constitutes a sufficient demand in writing for the payment of a mortgage debt within the meaning of a particular mortgage, see *Pennsylvania Co. v. Philadelphia etc. R. Co.* (1895) 69 Fed. 482.

other similar matters, is open to judicial correction. Ordinarily his action will be upheld, if actuated by good faith. The circumstance that he may possibly have been somewhat influenced by considerations of personal interest will not thwart the proceeding.⁵⁰

§ 2829. Construction of Accelerating Clause.

A provision that the debt shall become due and payable upon default in the payment of interest will generally be construed merely as giving the creditor the right to elect to treat the principal as then due for the purpose of foreclosure and not as making the principal unconditionally due, upon such default, so as to start the running of the statute of limitations. But if the creditor elects to treat the debt as then due, the statute begins to run from such default and not from the later date of stipulated maturity.⁵¹

§ 2830. Creditor's Election Must Be Prompt.

Where the creditor has an option to declare a debt due upon default in the payment of interest, his right of election should be promptly exercised after the default occurs, though it is not essential that he should act at once.⁵² In the case cited below the mortgage contained a provision declaring that if any instalment of interest should remain unpaid for ten days, it should be optional with the mortgagee to declare the whole sum due. An instalment of interest fell due in December. The notice of the mortgagee's option to declare the whole debt due was not served until in the succeeding February. It was held that this was too late. "The option should have been declared at the expiration of ten days, or within a very short and reasonable time thereafter."⁵³

§ 2831. Extension of Time by Indulgence or Agreement.

Mere indulgence after default or a promise of indulgence without any binding agreement to extend the debt for a definite time does not affect the right to bring foreclosure proceedings.⁵⁴ Nor will an agreement for indulgence for a definite time be given effect, though based on a consideration, where it is voluntarily waived and repudiated by

⁵⁰ *Bound v. South Carolina R. Co.* (1892) 50 Fed. 853.

⁵¹ *Moline Plow Co. v. Webb* (1891) 141 U. S. 616, 35 L. ed. 879, 12 Sup. Ct. 100; *Richardson v. Warner* (1886) 28 Fed. 343.

⁵² *Wheeler etc. Mfg. Co. v. Howard* (1896) 28 Fed. 741.

⁵³ *Wilson v. Winter* (1881) 6 Fed. 16.
⁵⁴ *Haselton v. Florentine Marble Co.* (1899) 94 Fed. 701.

all the parties to it as soon as it is made. Nor will a secret agreement be given effect against an innocent purchaser of the bonds who was not a party to the agreement.⁵⁵

§ 2832. Six Months' Clause—Prematurity of Suit.

A foreclosure suit is premature if brought within six months after default, where the deed of trust or mortgage only provides for a suit to be brought after that period.⁵⁶ But the fact that by the provisions of the mortgage the trustees are not entitled, of their own volition, to take possession of the mortgaged property until six months subsequent to default, does not deprive the court of equity of the right to entertain a bill to foreclose prior to that time.⁵⁷

Where a mortgage or deed of trust contains the six months' clause, and a default occurs, the subsequent acceptance of the overdue interest by the creditor restores the mortgage debt to its previous status of immaturity, and a suit to foreclose the mortgage cannot then be maintained.⁵⁸ But if the right to maintain a foreclosure suit is based on the non-payment of one or more instalments of interest, the acceptance of such interest by the mortgagee after the institution of the suit does not entitle the defendant to a dismissal, if other instalments of interest have subsequently matured and remain unpaid. The defendant should pay all.⁵⁹

§ 2833. Who May Complain of Prematurity of Suit.

A provision in a mortgage or trust deed to the effect that a suit to foreclose may not be brought until the expiration of six months from the time of default, is exclusively for the benefit of the debtor, and another creditor cannot complain that a suit is brought before the expiration of such period. The objection must come from the debtor.⁶⁰

§ 2834. Request in Writing for Institution of Suit.

A provision in a mortgage to the effect that no suit shall be brought by the bondholders, or trustee, to foreclose the mortgage except after

⁵⁵ *Farmers' Loan etc. Co. v. Rockaway etc. R. Co.* (1895) 69 Fed. 9.

⁵⁶ *Central Trust Co. v. Worcester Cycle Mfg. Co.* (C. C. A.; 1899) 35 C. A. 547, 93 Fed. 712.

⁵⁷ *State Trust Co. v. Kansas City etc. R. Co.* (1903) 120 Fed. 398.

⁵⁸ *Alabama etc. Co. v. Robinson* (C. C. A.; 1893) 56 Fed. 690, 6 C. C. A. 79.

⁵⁹ *American Loan etc. Co. v. Union Depot Co.* (1897) 80 Fed. 36.

⁶⁰ *Central Trust Co. v. Worcester Cycle Mfg. Co.* (1901) 110 Fed. 491 (1899) 35 C. C. A. 547, 93 Fed. 712; *Guaranty Trust etc. Co. v. Green Cove etc. R. Co.* (1891) 139 U. S. 137, 35 L. ed. 116, 11 Sup. Ct. 512.

a request in writing for the bringing of such suit made by the majority of the bondholders, must be complied with, and the bill to foreclose should show this fact.⁶¹ But a strict demand in accordance with such a provision is not necessary where the interest of the trustee becomes antagonistic to that of the bondholders and compliance is impossible.⁶²

A clause in a mortgage making it the positive duty of the trustee to institute foreclosure proceedings upon requisition of the holders of one-third of the bonds when default in the payment of interest has continued six months, is not to be construed as an inhibition against his bringing suit upon default in the payment of interest before such six months has expired.⁶³

Proceedings Incident to Foreclosure Suit.

§ 2835. When Foreclosure May Be Enjoined.

An injunction will lie to prevent the foreclosure of an invalid mortgage.⁶⁴ But the party complaining must be in a position to be adversely affected by the foreclosure. Otherwise he has no standing in court.⁶⁵

§ 2836. Stay of Suit Pending Action at Law.

A foreclosure suit may, in the discretion of the court, be stayed, while an action at law is brought by the plaintiff on the mortgage debt, in order that the defendant may have the right to set up by way of recoupment a claim for unliquidated damages not available to him by cross bill.⁶⁶

§ 2837. Scope of Foreclosure Proceedings—Separate Suits.

As a rule, a party cannot maintain different bills to foreclose one mortgage on several pieces of property covered by it. Therefore the bill should apply to the whole and not a part of the mortgaged premises. But if it appears that the mortgagor had no title to part or that a part has been foreclosed under a prior mortgage, this may be omitted from a suit to foreclose as to the remainder.⁶⁷

⁶¹ *Cochran v. Pittsburg etc. R. Co.* (1907) 150 Fed. 682.

⁶² *Cochran v. Pittsburg etc. R. Co.* (1907) 150 Fed. 682.

⁶³ *Mercantile Trust Co. v. Chicago etc. R. Co.* (1893) 61 Fed. 372.

⁶⁴ *Carpenter v. Talbot* (1888) 33 Fed. 537.

⁶⁵ *Baird v. Warwick Mach. Co.* (1889) 40 Fed. 386.

⁶⁶ *Nashua Sav. Bank v. Burlington etc. Co.* (1900) 99 Fed. 14.

⁶⁷ *Sedam v. Williams* (1845) 4 McLean 51, Fed. Cas. No. 12,609.

Separate suits brought by the trustee and by a bondholder, or other beneficiary, under the same mortgage or trust deed, cannot be maintained. The causes must either be consolidated, or the proceedings in one must be stayed and the controversy transferred to the other. The fact that the trustee's suit has taken such a turn as to contemplate a reorganization, instead of a foreclosure sale, does not justify the maintaining of an independent foreclosure suit by a bondholder, the court still having authority to grant such relief as any of the parties may be entitled to.⁶⁸

A creditor secured by a mortgage on a single piece of property, as a general rule, has a right, when default occurs, to have that property sold and to this end he may file a bill to foreclose the mortgage on that property. By participating in proceedings for the consolidation and merger of the mortgagor company with another corporation, the creditor might conceivably estop himself from so proceeding, but the case would have to be clear.^{68a}

§ 2838. Same—When Independent Suit by First Mortgagee Not Permitted.

A court having acquired full jurisdiction over the property and having appointed a receiver under a bill to foreclose a second mortgage, will not grant a petition filed by the first mortgagee to be permitted to bring an independent suit to foreclose the first mortgage. Being a party to the suit of the second mortgagee, the first mortgagee has ample opportunity to assert all his rights in that suit. The circumstance that he wishes to bring in new parties is no reason for allowing the independent suit, where they can be brought in by cross bill.⁶⁹

§ 2839. Same—Different Mortgages Included in One Suit.

A bill in a foreclosure suit is objectionable for multifariousness when it embraces two distinct mortgages made to secure separate loans on two different pieces of property owned by the same person, if it appears that the two pieces of property have been conveyed by the mortgagor to different parties who are in possession at the time the bill is filed and who are made defendants in the suit.⁷⁰

⁶⁸ *Stern v. Wisconsin Cent. R. Co.* (1890) 1 Fed. 555. ^{68a} *Mercantile Trust Co. v. Atlantic etc. R. Co.* (1895) 70 Fed. 518.

⁶⁹ *Olyphant v. St. Louis etc. Co.* (1885) 23 Fed. 465; *Central Trust Co. v. Wabash etc. R. Co.* (1885) 23 Fed. 303.

⁷⁰ *Eastern Building etc. Ass'n v. Denton (C. C. A.; 1895) 13 C. C. A. 44.*

But two mortgages should be foreclosed under one bill where one is executed to cure defects in the other and no inconsistent rights have accrued under them separately.⁷¹ If a renewal mortgage is void by statute, as having been executed on Sunday, the plaintiff may foreclose the original mortgage. But he cannot have such relief upon a bill brought to foreclose the void mortgage.⁷²

§ 2840. Contents of Bill to Foreclose.

The bill to foreclose should, among other things, sufficiently describe the mortgaged premises, and show the terms and conditions of the mortgage and the amount secured by it. It should also state the sum due and unpaid by the mortgagor. The plaintiff's right to maintain the suit should be fully shown by direct averments in conformity with the rules of equity pleading. A bill has been held insufficient where these facts were not directly alleged but were made to appear indirectly and only by reference to a bill filed in another court, a copy of the same being made an exhibit. The nature and extent of the relief asked should be made to appear, it was said, by clear and exact statements in the bill itself, apart from the exhibits.⁷³

The description of mortgaged property in the bill is sufficient if it is as definite as that contained in the mortgage.⁷⁴

§ 2841. Amount and Identity of Coupons Held by Plaintiff.

Holders of unpaid interest coupons, being entitled to file a bill to foreclose, need not in the bill identify themselves as holders of any particular coupons; nor are they even required to state the exact amount of coupons held by them. The general allegation that the plaintiffs hold such coupons is enough. But the total amount of interest coupons in default is properly stated. The proper time for the holders of the various bonds and coupons to produce them and show the extent of their holdings is when the cause has proceeded to judgment and a reference has been ordered for the purpose of ascertaining such details.⁷⁵ The question of the ownership of the bonds need not be determined in the preliminary stages of the foreclosure proceeding. It is only necessary that there should appear to be a default and the amount of the same.⁷⁶

⁷¹ *Robinson v. Piedmont Marble Co.* (1896) 75 Fed. 91.

⁷² *Hill v. Hite* (C. C. A.; 1898) 85 Fed. 268, 29 C. C. A. 549.

⁷³ *Mercantile Trust Co. v. Kanawha etc. R. Co.* (1889) 39 Fed. 337.

⁷⁴ *Grand Trunk R. Co. v. Central Vermont R. Co.* (1898) 88 Fed. 622.

⁷⁵ *Toler v. East Tennessee etc. R. Co.* (1894) 67 Fed. 168, 181.

⁷⁶ *Guaranty Trust etc. Co. v. Green Cove etc. R. Co.* (1891) 139 U. S. 137,

§ 2842. Insufficient Allegation of Innocent Purchase.

An averment in a bill to foreclose to the effect that the bond and coupons are owned by the plaintiffs and that they acquired title from a prior owner by virtue of an assignment for value, does not entitle the plaintiffs to claim as innocent purchasers for value and without notice, there being nothing to show that the assignment took place before the coupons became overdue.⁷⁷

§ 2843. Unnecessary Allegations—Averment of Plaintiff's Election.

By bringing a bill to foreclose the mortgagee exercises an "option" to treat the whole debt as due on default in payment of interest; and it is not necessary for him to allege in his bill that he exercised his option or that he gave notice thereof to the mortgagee.⁷⁸

§ 2844. Same—Allegation Negating Proviso of Mortgage.

A bill to foreclose for default in the payment of interest need not negative a proviso in the mortgage which takes away the right to foreclose when the failure to pay such interest is due to the fault of another person than the mortgagor. If the fact contemplated in such proviso exists, it is matter to be set up in the answer by way of defense.⁷⁹

§ 2845. Same—When Allegation of Demand Unnecessary.

If the bill in a foreclosure suit alleges the insolvency of the mortgagor and also that it had no funds at the time and place designated for the payment of the debt, a demand for payment at such place need not be alleged. The law does not require the performance of a fruitless act.⁸⁰

Defenses to Foreclosure Suit.

§ 2846. Mortgage as Incident of Secured Debt.

A mortgage or deed of trust is merely an incident of the debt secured by it, and any defense that would be good against the action to enforce the debt itself is a good defense to the bill to foreclose.

150, 35 L. ed. 116, 121; Central Trust Co. v. California etc. R. Co. (1901) 110 Fed. 70, 76. ⁷⁹ Little Rock Water Works Co. v. Barret (1881) 103 U. S. 516, 26 L. ed. 523.

⁷⁷ Caesar v. Capell (1897) 83 Fed. 403, 408. ⁸⁰ Shaw v. Bill (1877) 95 U. S. 10, 24 L. ed. 333.

⁷⁸ Quackenbush v. Lane (1877) Fed. Cas. No. 11,491.

Similarly no defense is, as a rule, available against the foreclosure of a mortgage given to secure a negotiable instrument which would not be also available against the negotiable instrument secured by the mortgage.⁸¹

§ 2847. Defense of Statute of Limitations.

That a debt is barred by the statute of limitations of the state where the property lies is therefore a good defense to a bill brought to foreclose a mortgage or deed of trust securing such debt.⁸²

§ 2848. Same—Defense Personal to Debtor.

The defense of the statute of limitations is, generally speaking, personal to the debtor.⁸³ Thus a defendant against whom no judgment is sought on the mortgage debt, and who is joined merely for the purpose of discovering whether he has any interest in the mortgaged property, cannot maintain a demurrer based on the ground that the cause of action is barred by the statute. Such defense cannot be interposed by one who neither owes the debt nor is shown to have an actual interest in the property to be foreclosed. But if such a person should answer and assert an interest in the property, he could then show that the cause of action was barred as between the plaintiff and the mortgage debtor.⁸⁴

Ewell v. Daggs (1883) 108 U. S. 143, 27 L. ed. 682: One A. mortgaged a tract of land to B. to secure a promissory note. A. afterwards conveyed the property to G. W. E. B. sued A. on the promissory note and obtained judgment. Later

⁸¹ *Kenicott v. Wayne County* (1873) Fed. Cas. No. 3,537; *Eubanks v. Leveridge* (1877) Fed. Cas. No. 4,544; *Fox v. Longan* (1873) 16 Wall. 271, 21 L. ed. 319; *Carpenter v. Blossom* (1879) Fed. Cas. No. 5,008; *Sawyer v. Prickett* (1873) 19 Wall. 313; *Reeves v. Vinacke* (1881) Fed. Cas. No. 11,663; *Sparks v. Pico* (1859) Fed. Cas. No. 13,211.

As to conditions under which a plea of failure of consideration will or will not defeat a mortgage, see *Bush v. Marshall* (1848) 6 How. 284, 12 L. ed. 440; *Orchard v. Hughes* (1864) 1 Wall. 73, 17 L. ed. 560. But it has been held that the fact that a judgment obtained in a court of law on the note secured by a mortgage is barred, does not necessarily take away the right of a trustee under a deed of trust to execute the power of sale contained in the same. See *Bank of Metropolis v. Guttschlick* (1840) 14 Pet. 19, 10 L. ed. 335.

⁸² *Moline Plow Co. v. Webb* (1891) 141 U. S. 616, 35 L. ed. 879, 12 Sup. Ct. 100; *Union Bank v. Stafford* (1851) 12 How. 327, 13 L. ed. 1008; *New Orleans Canal etc. Co. v. Stafford* (1851) 12 How. 343, 13 L. ed. 1015; *Foster v. Jett* (C. C. A.; 1896) 20 C. C. A. 670, 74 Fed. 678; *Brown v. Grove* (C. C. A.; 1897) 25 C. C. A. 644, 80 Fed. 564; *Cleveland Ins. Co. v. Reed* (1857) Fed. Cas. No. 2,889; *Daggs v. Ewell* (1879) 84 Fed. 737.

⁸³ *Sanger v. Nightingale* (1887) 122 U. S. 176, 184, 30 L. ed. 1105, 1106, 7 Sup. Ct. 1109; *Allen v. Smith* (1889) 129 U. S. 465, 32 L. ed. 732, 9 Sup. Ct. 338.

⁸⁴ *Blair v. Silver Peak Mines* (1898) 84 Fed. 737.

he filed a bill to foreclose, joining G. W. E. as a defendant. When this suit was brought, the time for the barring of the original debt had passed. This defense was of course not available to A., the mortgagor, because he had been sued on the note within the period of limitation. G. W. E., however, insisted that he was not a party to that action and urged that the debt ought to be considered as being barred so far as he was concerned and as regards the property to which he had acquired title. This was held untenable. Said the court: "The present suit is not to recover the debt, nor is it a suit against Geo. W. Ewell. He is a party defendant, because he has an interest by a subsequent conveyance in the lands sought to be sold under the mortgage. He has an equity of redemption, which entitles him to prevent a foreclosure and sale by payment of the mortgage debt; but the debt he has to pay is not his own."

§ 2849. Defense of Laches.

Laches sufficient in equity to bar the right to relief is a good defense to a suit to foreclose a mortgage.⁸⁵ In determining what delay is sufficient to constitute laches the courts will consider the analogy of the statute of limitations. Laches cannot be imputed where the cause of action is not yet barred by the statute.⁸⁶

§ 2850. Presumption of Payment from Lapse of Time.

After twenty years there is a presumption that the mortgage debt is discharged, and a suit to foreclose the mortgage cannot then be maintained in the absence of proof rebutting this presumption.⁸⁷ The circumstance that the mortgagee has been in possession during this period of twenty years,⁸⁸ or that a suit to foreclose has been brought, or that the mortgagee or his heirs have continuously resided out of the state, is sufficient to prevent such presumption of discharge from arising.⁸⁹

§ 2851. Defense of Fraud.

Fraud or breach of trust in the transaction out of which the debt or mortgage grew is available as a defense to a foreclosure suit,⁹⁰ but evidence of fraud or duress must be clear and convincing in order to

⁸⁵ *Washington v. Opie* (1892) 145 U. S. 214, 36 L. ed. 680, 12 Sup. Ct. 822, reversing *Opie v. Castleman* (1887) 32 Fed. 511; *Gunnison v. Chicago etc. R. Co.* (1902) 117 Fed. 629. ⁸⁶ *Cross v. Allen* (1891) 141 U. S. 528, 35 L. ed. 843, 12 Sup. Ct. 67, affirming *Allen v. O'Donald* (1886) 28 Fed. 346. ⁸⁷ *Hughes v. Edwards* (1824) 9 Wheat. 489, 6 L. ed. 142; *Wyman v. Russell* (1869) Fed. Cas. No. 18,115. ⁸⁸ *Brobst v. Brock* (1871) 10 Wall. 519, 19 L. ed. 1002. ⁸⁹ *Kibbe v. Thompson* (1873) 5 Biss. 226, Fed. Cas. No. 7,754; *Kibbe v. Dunn* (1873) 5 Biss. 233, Fed. Cas. No. 7,753. ⁹⁰ *Weaver v. Field* (1885) 114 U. S. 244, 29 L. ed. 143, 5 Sup. Ct. 844, affirming (1883) 16 Fed. 22.

impeach a deed duly signed and acknowledged.⁹¹ In defense of a suit to foreclose a mortgage given by the vendee of a particular piece of land, the vendee may set up a fraud perpetrated upon him in the transaction out of which the mortgage grew, though the fraud pertains more particularly to the sale to him of another lot on which a separate mortgage was given by him.⁹²

An alleged fraud in the sale of land is not a good defense to a foreclosure suit on the mortgage for the purchase money where the vendee, having knowledge of the alleged fraud, fails to attempt to avoid the transaction but on the contrary asserts rights under it.⁹³

§ 2852. Defense of Innocent Purchase.

Though as a general rule the purchaser of securities in the open market is deemed to be a *bona fide* holder, nevertheless when the mortgage or deed of trust has been found to be without consideration, the burden rests on the holder to show that he was an innocent purchaser for value.⁹⁴

§ 2853. Sundry Defenses.

Usury between the original parties to a loan for which a mortgage is given as security is not available as a defense to one who has bought the equity of redemption and against whom foreclosure proceedings are instituted.⁹⁵

Where the debt secured by a mortgage is justly due, it is no defense to the foreclosure suit that the mortgage was animated by hostility or other improper motive.⁹⁶

It is no defense to a foreclosure suit that the trustee has sold the property under the power of sale where it appears that such sale was not valid, for lack of a sufficient memorandum under the statute of frauds.⁹⁷

⁹¹ *Northwestern Mut. L. Ins. Co. v. Nelson* (1881) 103 U. S. 544, 26 L. ed. 436. predicated on the right of rescission, and hence delay on the part of such purchaser in asserting the right to rescind does not affect the defense.

⁹² *Hicks v. Jennings* (1890) 4 Fed. 855. *Green v. Turner* (C. C. A.; 1898) 86 Fed. 837, 30 C. C. A. 427.

⁹³ *Wright v. Phipps* (1898) 90 Fed. 556. ⁹⁴ *McVicar Realty Trust Co. v. Union Ry. Power etc. Co.* (1905) 136 Fed. 678.

⁹⁵ *De Wolf v. Johnson* (1825) 10 Wheat. 367, 6 L. ed. 343.

⁹⁶ *Dickerman v. Northern Trust Co.* (1900) 176 U. S. 190, 44 L. ed. 423.

⁹⁷ *Cook v. Hilliard* (1881) 9 Fed. 4.

A vendee of mortgaged premises who assumes to pay the mortgage debt, may, on being sued by the mortgagee on such assumption of the indebtedness, show that the transaction by which he bought the land and assumed the mortgage was induced by fraud. Such defense is not

Failure to present a note, secured by mortgage, at the bank where it is made payable is no defense to a suit to foreclose the mortgage where the parties to the note expressly waive presentment for payment.⁹⁸

In a suit to foreclose a mortgage on corporate property the answer admitted that the company by its officers executed the mortgage in question to secure the bonds made and delivered by them. It was held that this admission precluded the defense that the officers in question had no authority to execute the mortgage.⁹⁹

⁹⁸ Ray v. Tatum (C. C. A.; 1896) 72 Fed. 112, 18 C. C. A. 464; Tatum v. Ray v. ing Co. (1884) 112 U. S. 238, 28 L. ed. (1895) 69 Fed. 682. (Rule applied 684. where it appeared that the debtor had no funds in the bank of payment when the note matured.)

⁹⁹ Pugh v. Fairmount Gold etc. Min.

CHAPTER LXIX.

FORECLOSURE PROCEEDINGS (*continued*).

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Foreclosure Decree and Proceedings Incident to Sale.

§ 2854. Method of Foreclosure—Strict Foreclosure.

The equity courts of the United States undoubtedly have the power to effect a strict foreclosure in accordance with the practice of the English chancery without any sale of the mortgaged property; and this method of foreclosure may be adopted, under proper conditions, by the federal courts in states where strict foreclosures are allowable under the laws of the state.¹ But where a state statute prohibits resort to the proceeding of strict foreclosure and requires that the remedy shall be by foreclosure sale in all cases, the federal court will not grant a strict foreclosure, as such a state statute confers a right that ought not to be impaired in the federal courts. Where a strict foreclosure is allowed, the proceeding must be in conformity with the usage of the courts of chancery in such cases. One requisite of such a foreclosure is that the amount of the mortgage debt should be ascertained and that the mortgagor should be allowed a specific time within which to pay the debt and redeem from the mortgage before the time is reached when the title of the mortgagee becomes absolute under the decree. This period is dependent on the discretion of the court, but by conventional usage six months is commonly allowed. The period and terms of such redemption are fixed by the primary decree, and the period may be extended from time to time and the conditions changed as the discretion of the chancellor sees fit to order. A decree of strict foreclosure which does not find the amount due and which allows no time for the payment of the debt and the redemption of the property, and which is final and conclusive in the first instance, cannot be sustained in the absence of a special law authorizing it.²

¹ For a statement of the conditions foreclosure is adopted, see 2 Jones under which a strict foreclosure is Mortg. (4th ed.) §§ 1538-1570. proper and permissible in the various states, and for a general view of the practice in cases where this method of

² Clark v. Reyburn (1868) 8 Wall. 318, 322, 19 L. ed. 354.

§ 2855. Same—Foreclosure Sale.

By far the most common method of foreclosure used in the federal courts, as well as in courts of the states, is that which proceeds by a sale of the property.³ This proceeding is in reality rather a substitute for a foreclosure than a foreclosure proceeding in the proper sense. A court of equity has jurisdiction to order a sale independently of statutory provisions, and it can make an order for a sale in a case where a strict foreclosure is specially prayed for, if the court sees fit not to grant the decree of strict foreclosure.⁴

§ 2856. Decree of Sale—Order *Nisi*.

Where the plaintiff in a foreclosure suit appears to be entitled to a foreclosure, and a sale is ordered for the purpose of carrying the same into effect, the decree will, in the first instance, be drawn so as to allow the debtor or other interested person to come in and pay the amount due, thereby stopping the sale, and either putting the foreclosure proceedings to an end or postponing them. This decree is ordinarily put into the form of an order *nisi*. This order allows a reasonable time for the payment of the indebtedness upon which the right to foreclose is based.⁵ If the right to foreclose is based upon default of the whole debt or the whole can be treated as due, and the order *nisi* is complied with, the whole proceedings are thereby concluded, and the bill will be dismissed; but if the right to foreclose is based upon default in the payment of interest only or of one or more instalments, and the whole debt cannot be treated as due, compliance with the order *nisi* merely entitles the debtor to a suspension of the proceedings until another default occurs.⁶ The decree of sale *nisi* is preliminary in its nature and requires a further order of court to complete it.⁷

§ 2857. Ascertainment of Indebtedness, Costs, and Expenses.

It is not an essential prerequisite to the making of a decree of sale *nisi* that all the costs and expenses incident to the foreclosure be ascer-

³ See, generally, 3 Pom. Eq. Jur. (3d ed.) § 1228; 2 Jones, Mortg. (4th ed.) §§ 1571-1573.

⁴ *Sage v. Central R. Co.* (1878) 99 U. S. 334, 342, 25 L. ed. 394, 396.

⁵ *Toler v. East Tennessee etc. R. Co.* (1894) 67 Fed. 168, 181; *Merrill v. Dawson* (1846) Hempst. 563, Fed. Cas. No. 9,469.

⁶ *Farmers' Loan etc. Co. v. Chicago etc. R. Co.* (1886) 27 Fed. 146.

⁷ *Howell v. Western Railroad Co.* (1876) 94 U. S. 463, 24 L. ed. 254. Compare *Chicago etc. R. Co. v. Fosdick* (1882) 106 U. S. 47, 27 L. ed. 47.

tained, nor that all the disputed claims between the parties or urged by interveners should be precisely adjusted.⁸ All that is necessary is that there should be declared the fact, nature, and extent of the default that justified the filing of the bill and the amount due on account thereof, which is required to be paid in the reasonable limited time.⁹ The ascertainment of the details as to costs and expenses and the determination of the priorities of liens and other conflicting claims may properly be left to be settled by a subsequent decree.¹⁰ Any person entitled to redeem may, at any time before the sale is accomplished, ask the court to determine the exact amount necessary to be paid in order to prevent the sale and redeem the property.¹¹

§ 2858. Maturity of Debt as Affecting Decree of Sale.

In the conduct of foreclosure proceedings and in the ordering of the sale thereunder, it is often necessary to consider whether the whole or only a part of the mortgage debt is due. In the common case the whole debt is either in fact already due, or a provision will be found in the mortgage authorizing the trustee or creditor to treat the whole debt as being due upon default in the payment of any instalment of it or in default in the payment of interest. Where the whole debt is due or can be treated as due, the sale will of course include all of the property covered by the mortgage. It sometimes happens, however, that the mortgage or deed of trust authorizes foreclosure proceedings upon default in the payment of an instalment of the principal or interest, without accelerating the maturity of the whole debt. Where this is the case, a question arises whether the court should order a sale of the whole property covered by the mortgage or a sale of only so much of it as is necessary to satisfy the part of the debt that is already due and unpaid. In this connection it is to be borne in mind that the mortgage is a single indivisible contract, and any foreclosure proceeding based on it will, if pushed to a conclusion, foreclose all the rights covered by the mortgage; and this is true whether the foreclosure is based upon default as to part of the debt, or as to interest alone, or upon default as to the whole of the debt. In every case the single proceeding, when finally concluded and dismissed, will exhaust the mortgage and destroy the possibility of any future action being brought

⁸ *Grape Creek Coal Co. v. Farmers' Loan etc. Co.* (C. C. A.; 1894) 63 Fed. 891, 12 C. C. A. 350. ¹⁰ *First Nat. Bank v. Shedd* (1887) 121 U. S. 74, 30 L. ed. 877, 7 Sup. Ct. 807.

⁹ *Alabama etc. Co. v. Robinson* (C. C. A.; 1896) 72 Fed. 708, 19 C. C. A. 152. ¹¹ *Merrill v. Dawson* (1848) Hempst. 563, Fed. Cas. No. 9,469.

upon it.¹² But, on the other hand, it is obvious that where only a part of the debt or interest is in default, the decree of the court can be rendered only in respect to the amount actually due and unpaid.¹³ If only the interest or some of the instalments of the principal have matured, it is erroneous for the court to give a decree upon the unmatured portion as if it were due, and the sale must be predicated only on so much as can be decreed to be already due.¹⁴

§ 2859. Same—Sale to Satisfy Part of Debt.

But notwithstanding the considerations stated above, it is often possible for the court so to order the proceedings in the cause as to enable it to give effect to the substantial equities of the respective parties, without doing violence to the rights of either. For instance, if the property can be sold in parcels, or if it is of such nature that part can be easily separated, the sale of only so much will be ordered as is necessary to satisfy the part of the debt or interest already due and unpaid. In such case the court retains jurisdiction over the cause and over the property, and may, from time to time, order the sale of more, as may be necessary to satisfy the several instalments as they mature, or to pay the interest as it falls due.¹⁵ It is well settled that in the exercise of its equitable power to mould its decree of sale to suit the exigencies of each case, the court may order a sale to satisfy such part of the mortgage debt as is actually due, at the same time preserving the lien of the mortgage unimpaired on the property so far as the unmatured portion of the debt is concerned.¹⁶ In such case the cause is retained for further proceedings and directions until the mortgage debt matures.

§ 2860. Practice Where Property Not Divisible.

The procedure indicated above is, however, practicable only in those situations where the mortgaged property can be sold in parcels without detriment to it, and without unnecessary impairment of its value. If the property is not susceptible of being so separated and sold in parcels without injury to the whole, it will be sold as an entirety. In

¹² *Howell v. Railroad Co.* (1876) 94 U. S. 466, 24 L. ed. 256; *Chicago etc. R. Co. v. Fosdick* (1882) 106 U. S. 47, 27 L. ed. 47; *Grape Creek etc. Co. v. Farmers' Loan etc. Co.* (C. C. A.; 1894) 63 Fed. 895, 12 C. C. A. 350.
¹³ *Union Trust Co. v. St. Louis etc. R. Co.* (1878) 5 Dill. 1,
¹⁴ *Union Trust Co. v. St. Louis etc. R. Co.* (1878) Fed. Cas. No. 14,403.
¹⁵ *Farmers' Loan etc. Co. v. Oregon etc. R. Co.* (1885) 24 Fed. 407.
¹⁶ *Pennsylvania R. Co. v. Allegheny Val. R. Co.* (1891) 48 Fed. 139.

such case the lien of the mortgage is entirely exhausted and the whole property is converted into a fund which will be applied to the payment of the part of the debt already due, and any balance will be held by the court as a security for the portion of the debt not yet due; or it may in the discretion of the court be actually applied to the undue debt, just allowance being made in respect to interest not yet due.¹⁷

1. *Black v. Reno* (1894) 59 Fed. 917, 931: In regard to the character of the decree to be entered where the creditor proceeds to foreclose upon default as to the first of a series of notes or upon default as to one instalment of a debt, the court said: "A decree of foreclosure will go for the amount of the debt due, and a sale will be decreed of so much of the mortgaged premises as will be sufficient to satisfy the amount due, and the decree will stand as a security for the remaining instalments as they become due; but, if the property be not susceptible of division into parcels without injury to the whole, it may be sold as an entirety, and any surplus realized beyond a sum requisite to satisfy the debt due will be returned into court, subject to application by the chancellor. In such case, in the conservation of the best interests of all concerned in the fund, the chancellor will at once direct its application to the liquidation of the deferred instalments, with such rebate of interest thereon as may be just and equitable." A reference can, of course, be ordered to ascertain whether the property covered by the mortgage may properly be sold piecemeal or must be sold as a whole.

2. *Howell v. Western R. Co.* (1876) 94 U. S. 463, 24 L. ed. 254: In a suit to foreclose a railroad mortgage given to secure bonds and coupons it appeared that the principal would not mature, and that consequently there could be no default by reason of the nonpayment of the principal, for thirty years; but there had been default as regards the interest coupons, and the mortgage authorized a sale for the nonpayment of these. It was held that the provision authorizing a foreclosure for default in the payment of the coupons was valid; and as there could be but one decree of foreclosure of the same mortgage on the same property the court proceeded in this wise: The amount due on the unpaid coupons was directed to be ascertained and a decree of sale nisi was directed to be entered giving the company a reasonable time to pay the coupons. If they should not be paid within the period so fixed, the court indicated that an absolute order of sale would thereupon be entered. Such sale, it was said, would embrace and foreclose all rights subordinate to (i. e. covered by) the mortgage, and the proceeds would be required to be brought into court. This fund, it was indicated, would represent the security of the mortgage creditors both as to the interest coupons and the unmatured principal; and the court would then be required to provide for the preservation of the security as to the principal as well as to satisfy the unpaid coupons. All holders of junior incumbrances who are made parties to such a suit are foreclosed of the right of redemption, as well as the mortgagor.¹⁸

¹⁷ *Central R. Co. v. Central Trust Co.* justified, see *Shepherd v. Pepper* (1890) 133 U. S. 83, 33 L. ed. 561. 133 U. S. 626, 33 L. ed. 706, 10 Sup. Ct.

As illustrating the conditions under which a sale, as an entirety, of property

covered by different mortgages may be ¹⁸ See *Simmons v. Burlington etc. R. Co.* (1895) 159 U. S. 278, 40 L. ed. 140,

§ 2861. *Same*—Sale of Railroad Property.

Railroad properties covered by a mortgage are nearly always sold as a whole, it being considered that property of this nature cannot easily or advantageously be severed into parcels and sold at successive intervals. This rule has been followed even in a case where there were three separate first mortgages on three different divisions of the road, each mortgage being also a second mortgage on the other divisions.¹⁹ But a sale of railroad property will not be ordered as an entirety where different branches of the property are subject to different mortgages held by parties with conflicting interests.²⁰

§ 2862. *Sale Free from Incumbrances.*

In a foreclosure suit brought by a junior incumbrancer, the court may in its discretion sell the property free from all liens, if the first mortgagee is made a party. In such case the lien of the latter is transferred to the proceeds and must be satisfied first.²¹

§ 2863. *Upset Price.*

In making the order for the sale of mortgaged property an upset price will usually be named. This should be large enough to cover all obligations prior to the mortgage debt, such as costs and allowances made by the court in the foreclosure proceedings, and all receivers' certificates.²² In fixing the upset price, the court can also make allowance for a reasonable profit to be made by the purchaser.²³ Where an upset price is named, and a bid is obtained for the property at that price, or more, the court will usually confirm the sale; but if no upset price has been named, the court has authority to refuse confirmation, if the bid should appear to be insufficient.²⁴

§ 2864. *Allowing Trustee to Bid at Foreclosure Sale.*

Ordinarily a trustee cannot be permitted to bid at his own sale; but where a trustee was authorized by the terms of the mortgage to

¹⁹ *Low v. Blackford* (C. C. A.; 1898) 87 Fed. 392, 400, 31 C. C. A. 15.

²⁰ *Wabash etc. R. Co. v. Central Trust Co.* (1884) 22 Fed. 188.

²¹ *Hagan v. Walker* (1852) 14 How. 29, 14 L. ed. 312; *Sutherland v. Lake Superior etc. Co.* (1874) Fed. Cas. No. 13,642.

²² *Blair v. St. Louis etc. R. Co.* (1885) 25 Fed. 232.

²³ *Central Trust Co. v. Washington County R. Co.* (1903) 124 Fed. 818, 819.

²⁴ *Central Trust Co. v. Washington County R. Co.* (1903) 124 Fed. 818, 818.

As to the effect of an order of sale free from liens held by parties to the Eq. Prac. Vol. —104.

buy the property in at any sale under the mortgage, and to hold the same for the benefit of the bondholders, and where he was also authorized, in the event that he should become a purchaser of the property, to organize a new company, and to transfer the property to such company, it was held to be proper for the court to sanction this authority on the part of the trustee to purchase, or at least to authorize him to bid to the extent of the principal and interest of the bonds represented by him. And provisions in the decree looking to the due carrying out of the further provisions of the trust were also held to be proper.²⁵

§ 2865. Modification of Decree of Sale.

The decree of sale may be amended as regards the details of the sale after the term at which the original decree of sale was entered is past, as by changing the time of publication, mode of sale, and distribution of the proceeds. So, likewise, it can be amended so as to provide that the property shall be sold subject to certain claims for the payment of which it was originally provided that the purchaser should pay money into the court.²⁶

It is within the discretion of the court to allow a postponement of the sale, but such an order will not be made where the party seeking the postponement appears to have been lacking in diligence or fails to show a meritorious ground for such step. An application to postpone has been refused where it was made only two days before the date fixed for the sale and was not accompanied by a tender or offer to pay the amount due.²⁷

§ 2866. Construction of Decree.

In a foreclosure suit where the court has acquired jurisdiction over the property by publication but not over the person of the mortgagee, a decree running to the effect that the plaintiff have and recover of and from the defendant "out of the mortgaged premises" the sum found to be due, will be construed as a decree *in rem* against the property for that amount, *ut res valeat*.²⁸

§ 2867. Confirmation of Sale.

The question of the propriety of confirming a judicial sale may be determined on a motion supported by *ex parte* affidavits, and this

²⁵ *Sage v. Cent. R. R. Co.* (1878) 99 U. S. 334, 25 L. ed. 394.

²⁶ *Turner v. Indianapolis etc. R. Co.* (1878) Fed. Cas. No. 14,259.

²⁷ *Duncan v. Atlantic etc. R. Co.* (1880) 88 Fed. 840, 4 Hughes 125.

²⁸ *Palmer v. McCormick* (1886) 28 Fed. 541.

is the appropriate practice where the situation requires prompt action on the part of the court.²⁹

An objection to the validity of the original decree of sale in a foreclosure suit is not available when the sale comes up for confirmation.³⁰

§ 2868. Setting Aside for Inadequacy of Price.

In order to set aside a sale in foreclosure proceedings on account of the inadequacy of the price, it is not sufficient to show that the property has realized less than its full value. The price must be so inadequate as to show that the sale was not the result of fair dealing and that the purchase was not honestly made.³¹

§ 2869. Ordering Resale.

If the purchaser at a foreclosure sale fails to carry out his contract, the court, having in its previous orders reserved the requisite jurisdiction, may order a resale. Resort to an original bill is not necessary. Such an order may be made on a rule to show cause. An order of resale is proper, for instance, where the purchaser refuses to pay part of the purchase money or any expense for which he is liable.³²

§ 2870. Liability of Master for Unauthorized Sale.

In a mortgage foreclosure proceeding if the master, under the authority of the decree of sale, takes possession of property not embraced in the decree and sells it, he is liable to the owner for such illegal seizure in any proper court.³³

§ 2871. Sale in Inverse Order of Alienation.

Where different portions of the mortgaged property have been sold at different times to different vendees, subsequent to the execution of the mortgage, the property will ordinarily be directed to be sold at the mortgage sale in the inverse order of alienation; and the rule that alienated portions of the mortgaged premises must be sold in the inverse order of their alienation will be enforced as a rule of prop-

²⁹ *Savery v. Sypher* (1868) 6 Wall. 157, 18 L. ed. 822.

³⁰ *Central Trust Co. v. Peoria etc. Co.* (C. C. A.; 1902) 118 Fed. 30, 55 C. C. A. 52.

³¹ *Turner v. Indianapolis etc. R. Co.* (1878) 8 Biss. 380,

³² *Stuart v. Gay* (1888) 127 U. S. 518, 8 Sup. Ct. 1279, 33 L. ed. 191.

³³ *Perry v. Tacoma Mill Co.* (C. C. A.; 1907) 152 Fed. 115, 119, 81 C. C. A. 333,

erty by a federal court sitting in the jurisdiction where the rule itself is enforced.³⁴

§ 2872. Second Foreclosure Suit.

A second foreclosure bill brought by the same party as the first will be entertained where the first foreclosure appears to have been rendered ineffectual by some defect or mistake in the former proceedings, especially where such error is not chargeable to the plaintiff therein. And the failure of the plaintiff in the original suit to file an amended bill in that suit upon discovering a defect curable by amendment does not prevent him from afterwards maintaining the second foreclosure suit.³⁵

The bill in a second foreclosure suit brought because of the discovery of a defect in the original proceedings should ask that such proceedings be set aside so far as may be necessary to cure the defect and that from such point the original proceedings be carried into effect. Thus, it may be ordered that the sale be set aside and the original order of sale be carried into effect anew, if thereby the defect may be cured.³⁶

§ 2873. Right of Redemption after Sale Complete.

Where the court of equity orders a sale of the mortgaged property, according to its customary practice, in order to realize a fund from which the mortgage debt may be satisfied, the sale is usually made free from the equity of redemption, and a title is finally conferred upon the purchaser which is indefeasible as against the mortgagor.³⁷ There are, however, in some of the states, local statutes securing to the mortgagor a statutory right of redemption within a stated period after the sale. Such a statute creates a right in favor of the mortgagor which must be respected by the federal courts; and in entering a decree for a foreclosure sale, in a state where such a law exists, the federal court will so shape its decree as to preserve the statutory right of redemption, even though, according to the usual practice of the

³⁴ *Orvis v. Powell* (1878) 98 U. S. 176, 25 L. ed. 238.

³⁵ *Johns v. Wilson* (1901) 180 U. S. 440, 45 L. ed. 613, 21 Sup. Ct. 445.

³⁶ *Johns v. Wilson* (1901) 180 U. S. 440, 45 L. ed. 613, 21 Sup. Ct. 445.

³⁷ *Parker v. Dacres* (1889) 130 U. S. 43, 32 L. ed. 848.

A local statute giving a right to

redeem in case of mortgages of realty cannot be applied to mixed mortgages covering both personalty and realty, if such properties are connected together and used as an indivisible whole. *Hammock v. Loan & Trust Co.* (1881) 105 U. S. 77, 26 L. ed. 1111; *American Loan & Trust Co. v. Union Depot Co.* (1897) 80 Fed. 36.

court, it is proper to have the property sold free from the right of redemption and to enter a final decree barring the right.³⁸ But if an absolute sale is ordered and no provision is made in the decree preserving the statutory right of redemption after the foreclosure sale, such right can nevertheless be exercised within the time limited by the state law.³⁹

An error in entering a decree barring the right of redemption where such right is secured by local statute is not waived by reason of the fact that the party affected by the decree does not pay or tender the sum necessary to redeem and does not appeal until the time fixed by statute for redemption has expired.⁴⁰

Application of Proceeds.

§ 2874. Distribution of Proceeds as Determined by Terms of Mortgage.

In regard to the distribution of the proceeds and surplus resulting from the sale of the mortgaged property in foreclosure proceedings, the first principle to be observed is the order of distribution fixed by the parties to the contract itself. If the mortgage stipulates for a particular mode this predetermines the distribution of the proceeds and fixes the rights of the parties to the mortgage in regard to the same. Thus if the mortgage provides that defaulted interest coupons shall have priority over the principal of the bonds secured by the mortgage, the decree directing the distribution of the surplus should provide that the same shall be first applied to the coupons; and it is erroneous in such case to decree a *pro rata* payment of the coupons and the bonds.⁴¹ But a mere agreement on the part of a company to pay a particular demand out of the proceeds of the first bonds sold does not give that creditor a right to have his claim paid first when the property is foreclosed.⁴²

³⁸ *Brine v. Insurance Co.* (1877) 96 U. S. 627, 24 L. ed. 858; *Orvis v. Powell* (1878) 98 U. S. 176, 25 L. ed. 238; *Ins. Co.* (1892) 106 U. S. 163, 27 L. ed. 129, 1 Sup. Ct. 165.

³⁹ *Swift v. Smith* (1890) 102 U. S. 442, 26 L. ed. 193; *Manufacturing Co. v. Compare* *Burke v. Short* (C. C. A.; 1897) 79 Fed. 6, 24 C. C. A. 422.

⁴⁰ *McCollock* (1884) 24 Fed. 667; *Jackson & Sharp Co. v. Burlington etc. R. Co.* (1897) 29 Fed. 474; *Hards v. Connecticut Mut. L. Ins. Co.* (1878) Fed. Cas. No. 6,055; *Busley v. Flint* (1879) 9 Bias. 204, Fed. Cas. No. 2,168, note.

⁴¹ *Burley v. Flint* (1879) Fed. Cas. No. 2,168.

⁴² *Mason v. Northwestern Mut. Life*

As to interpretation to be given terms of mortgage in regard to application of proceeds in the particular case, see *McTighe v. Keystone Coal Co.* (C. C. A.; 1900) 99 Fed. 134, 39 C. C. A. 447.

⁴³ *Central Trust Co. v. California etc. Co.* (1901) 110 Fed. 70.

The application of the proceeds may be determined by stipulation of the parties.⁴³

§ 2875. Statutory Provisions Governing Distribution of Proceeds.

The order in which the proceeds of a mortgage foreclosure shall be applied is also subject to such valid statutes as may have been enacted prior to the making of the mortgage.⁴⁴

§ 2876. Claims Sharing Equally in Proceeds of Sale.

In the absence of statute or controlling provision in the mortgage or deed of trust, the rule that equality is equity prevails, and the surplus will be equally distributed upon all of the obligations secured by the mortgage or deed of trust which are actually due and to satisfy which the suit was brought. Thus, if there are several notes given by the same debtor, growing out of the same transaction, and all are due and payable, and secured equally by a mortgage, and there is a judicial foreclosure on all the notes, the proceeds of the sale of the mortgaged property, if not sufficient to pay all the notes, should be credited *pro rata* on the several obligations secured. This rule applies with special force where third persons, such as sureties on some of the notes, are interested in the distribution. The fact that one note matures before the other does not entitle it to preference.⁴⁵

§ 2877. Same—Interest Coupons.

Interest coupons are not entitled to priority in the absence of express provision to that effect, and they will ordinarily be paid *pro rata* with the principal.⁴⁶ The circumstance that coupons held by some creditors have been paid in full gives the holders of other coupons no right to have theirs paid in full to the prejudice of the bonds.⁴⁷

§ 2878. Same—Series of Bonds Irregularly Issued.

If a series of bonds is issued extending to a greater number than is authorized to be issued, all of such bonds must share equally, though

⁴³ Meaning of "gross proceeds," as Moore (C. C. A.; 1828) 85 Fed. 920, 29 used in stipulation concerning the appli- C. C. A. 636.

Surety Co. v. Worcester Cycle Mfg. Co. S. 659, 24 L. ed. 868; Dunham v. Cincinnati etc. R. Co. (1863) 1 Wall. 254, 17 (1902) 114 Fed. 658.

⁴⁴ King v. Thompson (C. C. A.; 1901) L. ed. 584.

110 Fed. 319, 49 C. C. A. 59.

⁴⁵ Burke v. Short (C. C. A.; 1897) C. A.; 1900) 99 Fed. 134, 39 C. C. A. 79 Fed. 6, 24 C. C. A. 422; Rogers v. 447. See, however Stevens v. New York

⁴⁶ Ketchum v. Duncan (1878) 96 U.

⁴⁷ McTighe v. Keystone Coal Co. (C.

the bonds are serially numbered. All bonds of the series are to be treated as being on the same footing. Those bearing numbers higher than the number where the series should properly have ended are not to be treated as void. The numbering is merely a mechanical device to aid in identifying and registering the bonds.⁴⁸

§ 2879. Distribution Subject to Prior Liens and Equities.

The maxim that equality is equity will not be applied so as to defeat existing legal priorities. Unless in exceptional cases where the assets are of a purely equitable nature, distribution will be made only in conformity with legal liens and priorities.⁴⁹ All liens cleared away by the foreclosure sale attach to the proceeds in the same manner and order, and with the same effect, as they were previously attached to the property itself.⁵⁰ A change in the form of an obligation does not operate to deprive it of a right to preferential payment.⁵¹

A preference attaching to a claim inheres in the claim itself and is not merely a personal right of the holder of the claim. Accordingly, the right of preference passes to an assignee of the claim.⁵²

§ 2880. First Mortgagee's Right of Priority.

If the first mortgagee is made a party to foreclosure proceedings brought by the second mortgagee, and the property is sold for the satisfaction of both mortgages and free from incumbrances, the first mortgage must first be paid in full, then the second mortgage.⁵³ But a prior mortgagee who is not a party to a foreclosure suit brought by a junior mortgagee and whose mortgage still remains an incumbrance on the property in the hands of a purchaser at such foreclosure sale is not entitled to have any part of the proceeds of such sale applied to his

etc. R. Co. (1876) 13 Blatchf. 412, Fed. Cas. No. 13,406.

⁴⁸ *Stanton v. Alabama etc. R. Co.* (1875) 2 Woods 523, Fed. Cas. No. 13,297.

⁴⁹ *Central Trust Co. v. East Tenn. etc. R. Co.* (1895) 69 Fed. 658.

The circumstance that different notes secured by the same mortgage represent claims of a different character may justify the giving of preference to some of the notes over the others. *Providence County Sav. Bank v. Frost* (1875) 8 Ben. 293, Fed. Cas. No. 11,453.

⁵⁰ *Markey v. Langley* (1876) 92 U. S. 142, 23 L. ed. 701.

For a consideration of the subject of the disposition of the proceeds in receivership causes, see *ante*, §§ 2736-2771.

⁵¹ *Appeal of Columbus etc. R. Co.* (C. C. A.; 1901) 109 Fed. 177, 215, 48 C. C. A. 275.

⁵² *Trust Co. v. Walker* (1883) 107 U. S. 596, 27 L. ed. 490, 2 Sup. Ct. 299; *Columbus etc. R. Co. Appeals* (C. C. A.; 1901) 109 Fed. 197, 48 C. C. A. 275.

⁵³ *Miltenberger v. Logansport etc. R. Co.* (1882) 106 U. S. 286, 27 L. ed. 117.

mortgage. In such case the second mortgagee is entitled to all the proceeds properly applicable to the mortgage indebtedness.⁵⁴

§ 2881. Purchaser Taking Subject to Existing Liens.

In so far as the purchaser at a foreclosure sale takes subject to existing prior liens and incumbrances, he is not entitled to be exonerated from such charges by having any of the purchase price paid by him applied to the extinguishment of such liens. The fact that the existence of the liens may have been unknown does not alter the case. The maxim of *caveat emptor* here applies.⁵⁵

§ 2882. When Proceeds Applicable to Part of Debt Not Yet Due.

Where the mortgaged property is incapable of division without injury and for this reason has to be sold as an entirety, the proceeds may be applied to the payment of the whole debt, that which is not yet due as well as that which is overdue. This stops the interest and extinguishes the entire liability, provided enough is realized from the sale to accomplish this. And such application may be properly made though the mortgage itself authorizes the payment of the overplus to the mortgagor.⁵⁶

§ 2883. Claims of Subordinate Lienholders.

Creditors and incumbrancers having a lien on the premises subordinate to the mortgage in respect to which the sale is made are entitled to share in the proceeds after the prior liens are satisfied. To this end it is not unusual for the court to direct a reference to ascertain the persons who are rightly entitled to share in the fund, in order that a proper distribution of the same may be made;⁵⁷ and any party to the suit having such subordinate lien is entitled to a reference on his own motion. Also, one who has an interest in the property, but who is not an actual party to the suit, may intervene on petition and set up his claim to the proceeds.⁵⁸ By failing to intervene at the proper juncture the rights of a creditor to have his claim allowed out of the fund may be lost.⁵⁹

⁵⁴ *Woodworth v. Blair* (1894) 112 U. S. 9, 29 L. ed. 615, 5 Sup. Ct. 6.

⁵⁷ 3 Pom. Eq. Jur. (3d ed.) § 1222.

⁵⁸ *Jones on Mortg.* (4th ed.) 1694.

⁵⁵ *Terre Haute etc. R. Co. v. Harrison* (C. C. A.; 1899) 96 Fed. 907, 37 C. C. A. 615.

⁵⁹ *State Trust Co. v. Kansas City etc.* (1903) 120 Fed. 398.

⁵⁶ *Oleott v. Bynum* (1872) 17 Wall. 44, 63, 21 L. ed. 570, 575.

§ 2884. Waiver of Priority by Creditor.

A party entitled to the payment of a particular claim out of a fund resulting from a foreclosure sale loses his right of priority *pro tanto* by consenting to the payment from that fund of other claims not properly chargeable to it.⁶⁰

§ 2885. Final Residue Payable to Mortgage Debtor.

After all the costs and expenses of the foreclosure proceedings have been paid, or provided for, and the mortgage debt satisfied, and after all other legitimate prior charges have been ascertained and paid or secured, any residue remaining in the custody of the court from the proceeds of the sale will be paid to the mortgagor.⁶¹ But a mere holder of a general equity who is not a party to the suit is not entitled to have any part of the proceeds adjudicated to him.⁶²

*Deficiency Decree.***§ 2886. Power of Court of Equity to Grant Decree for Deficiency.**

The practice of rendering a personal decree in a foreclosure suit, against the mortgage debtor, for any balance of the mortgage debt that may remain unsatisfied after the proceeds of the sale have been properly applied thereto is of modern origin. According to the original practice of the English court of chancery, the personal right of action against the debtor for the recovery of the debt was considered entirely distinct from the right to foreclose in equity, or rather the foreclosure proceeding was considered to be merely a cumulative remedy, resort to which did not affect the right to resort to the remedy at law.⁶³ The remedy at law being complete and, so far as it went, adequate, there seemed to be no hardship in the refusal of the equity court to entertain jurisdiction for the purpose of giving a personal deficiency decree enforceable by execution. This notion was especially in harmony with the practice of strict foreclosure, formerly prevalent, by means of which the mortgagor obtained a decree barring the mortgagee's right of redemption, without a sale, thereby securing to himself a complete title to the mortgaged property. With the changes that have in modern times supervened in the equitable conceptions of the respective

⁶⁰ *Central Trust Co. v. Cincinnati etc.* Fed. Cas. No. 6,200; *O'maly v. Swan R. Co.* (1892) 58 Fed. 500. (1824) 3 Mason 474, Fed. Cas. No.

⁶¹ 3 Pom. Eq. Jur. (3d ed.) § 1228. 10,508. Compare *Fairfax v. Hopkins*

⁶² See *Vose v. Bronson* (1867) 6 Wall. (1817) 2 Cranch, C. C. 134, Fed. Cas. 452, 18 L. ed. 846. No. 4,614.

⁶³ *Hatch v. White* (1814) 2 Gall. 152,

rights of the parties to the mortgage, and, more particularly, with the extension of the practice of ordering the sale of the mortgaged property to satisfy the mortgage debt, the inconvenience and hardship of remitting the creditor to his separate action at law has become more obvious. If the mortgagor is to be granted the favor of insisting on a sale of the premises—and it is for his benefit exclusively that such sale is made—it is certainly proper that the rule with regard to the right of the creditor to recover the deficiency in the court of equity after the sale is made should be reconsidered. In strict foreclosures, the property itself, on becoming vested in the mortgagee free from the equity of redemption, may well be considered to be a full satisfaction to the defendant. But where the debt is judicially ascertained and the value of the property is lawfully determined by the sale, it seems inequitable to turn the creditor away without a decree for the deficiency. Accordingly in the course of the last century the American courts have gotten away from the earlier rule of English practice. Some of the courts have acted on the principle, very properly applicable here, that having acquired jurisdiction for the purpose of foreclosure and having judicially determined the amount of the deficiency as a natural incident of that proceeding, the court may rightly retain the cause for the purpose of giving a personal decree for the deficiency.⁶⁴ For the most part, however, the change, so far as the state courts are concerned, has been brought about or aided by statutory provisions.

§ 2887. Practice Allowing Deficiency Decree in Federal Courts.

The practice of the supreme court of the United States and of the various federal courts was originally in conformity with the old rule; and, accordingly, the right of the mortgagee to obtain a deficiency decree in foreclosure proceedings was denied in these courts even where the state law provided to the contrary.⁶⁵ By a rule adopted in 1864 the practice on this point in the federal courts was changed, however.⁶⁶

Equity Rule 92: In suits in equity for the foreclosure of mortgages in the circuit courts of the United States, or in any court of the territories having juris-

⁶⁴ *Anderson v. Pilgram* (1888) 30 S. C. 502, 4 L.R.A. 205, *Nolen v. Woods* (1883) 12 Lea 615; *Walters v. Farmers Bank* (1881) 76 Va. 12.

⁶⁵ *Noonan v. Braley* (1862) 2 Black 490, 17 L. ed. 278; *Orchard v. Hughes* (1863) 1 Wall. 73, 17 L. ed. 500.

⁶⁶ A bill to foreclose a vendor's express lien is in substance a bill to foreclose a mortgage, and the equity rule giving the plaintiff the right to a personal decree for the unsatisfied residue is applicable in such a suit. *White v. Ewing* (C. C. A.; 1895) 69 Fed. 451, 16

diction of the same, a decree may be rendered for any balance that may be found due to the complainant over and above the proceeds of the sale or sales, and execution may issue for the collection of the same, as is provided in the eighth rule of this court regulating the equity practice, where the decree is solely for the payment of money.⁶⁷

§ 2888. Deficiency Decree as Matter of Right.

Under this rule it has been held that the mortgagee is entitled to a deficiency decree as a matter of right, and not as of mere discretion, such a decree being "a necessary incident of a foreclosure suit in equity."⁶⁸

Northwestern Mut. Life Ins. Co. v. Keith (C. C. A.; 1896) 77 Fed. 374, 23 C. C. A. 196: In reversing a decree of the court below for refusing to grant a decree for a deficiency, the circuit court of appeals of the eighth circuit said: "The only debatable point is whether the word 'may' as used in the rule, is permissive or mandatory. Instances are very common where the word 'may' is used as a synonym for 'shall' or 'must.' The word is usually construed as being mandatory, rather than permissive, when a statute prescribing rules of procedure declares that in a certain event the court 'may' act in a certain way. To warrant a different interpretation in such cases, it should clearly appear from other provisions of the statute that the exercise of the power conferred was intended to be discretionary. We can perceive no good or sufficient reason why the word 'may' as used in rule 92, should be regarded as conferring a discretionary power, to be exercised, or not, at the will of the chancellor. It is a well-known maxim that a court of equity, having acquired jurisdiction of a case, will proceed to administer full and complete relief, and will not compel either party to seek further relief in another forum if it can avoid doing so. When, therefore, in a foreclosure suit the amount of the mortgage debt has been ascertained and adjudicated, and a sale of the mortgaged property has been ordered, made, and confirmed, and the amount realized from such sale is insufficient to pay the mortgage indebtedness, no reason would seem to exist why the chancellor should be vested with the discretion to refuse to render a judgment for the deficiency. Such action on its part is not beneficial to either party, but simply compels the complainant to resort to a court of law for further relief, which might as well be administered in the foreclosure suit."⁶⁹

A clause in a deed of trust, prescribing the terms of sale, which shows an expectation on the part of the creditor that the property will,

C. C. A. 296, *modifying* (1895) 66 Fed. S. 445, 27 L. ed. 206, 1 Sup. Ct. 335: 2, 13 C. C. A. 276. *Shepherd v. Pepper* (1890) 133 U. S. 626, 33 L. ed. 706, 10 Sup. Ct. 438.

⁶⁷ In the District of Columbia the entering of a deficiency decree in mortgage foreclosure is authorized by statute. The statute applies also to proceedings to foreclose a deed of trust in the nature of a mortgage. *Dodge v. Freedman's Sav. etc. Co.* (1882) 106 U. S. 445, 27 L. ed. 206, 1 Sup. Ct. 335.

⁶⁸ *Shepherd v. Pepper* (1890) 133 U. S. 626, 33 L. ed. 706.

⁶⁹ In *Phelps v. Loyhed* (1871) 1 Dill. 512, Fed. Cas. No. 11,077, Judge Dillon had expressed the opinion that equity rule 92 gives the court a discretionary

if sold, bring at least the amount of the debt and expenses does not estop the creditor from recovering a deficiency, where the property is sold according to the terms of the deed and fails to realize enough to pay off the debt.⁷⁰

§ 2889. When Deficiency Recoverable in Separate Legal Action.

Though it thus appears that a plaintiff who seeks a personal decree for a deficiency is entitled to have such a decree in the foreclosure suit, and the court has no discretion to refuse it, it is nevertheless true that if, in any foreclosure proceeding, a deficiency decree is not in fact awarded, the plaintiff, being entitled thereto, may recover the deficiency in an independent action at law. Equity rule 92 confers merely a concurrent jurisdiction on the court of equity as regards the deficiency, and its jurisdiction in this respect is not exclusive. However, in determining the question whether a separate action at law will lie in a federal court to recover a deficiency, some consideration must be given to the law of the state in reference to the recovery of such a deficiency in actions at law; for in federal courts of law the same forms of proceeding are followed and the same rights are generally enforced, as in the state courts. Accordingly where a state statute expressly provides that a separate action at law cannot be maintained to recover a deficiency, such statute will be given effect in the federal court;⁷¹ and in such states, the creditor's exclusive remedy is to obtain his deficiency decree in the foreclosure suit.

§ 2890. Who Entitled to Deficiency Decree.

A deficiency decree will be granted in a foreclosure suit in favor of any party who has a personal right of action on the mortgage debt against the defendant in the proceedings. A junior lienholder may recover a deficiency decree, though the property is wholly consumed in paying off the prior incumbrance.⁷²

§ 2891. Against Whom Deficiency Decree May Be Recovered.

In a foreclosure suit a deficiency decree may be recovered against a grantee of the mortgagor, where such grantee has purchased the

authority, and he accordingly refused to grant a deficiency decree where the plaintiff was guilty of laches though the debt was not actually barred. ⁷¹ *Winters v. Hub Mining Co.* (1893) 57 Fed. 287.

⁷² *Hayden v. Drury* (1889) 3 Fed. 782; *Jarboe v. Templer* (1889) 39 Fed.

⁷⁰ *Shepherd v. May* (1895) 115 U. S. 216. 505, 29 L. ed. 436, 6 Sup. Ct. 119.

property and assumed the mortgage debt, provided he is a party to the foreclosure proceeding.⁷³

A deficiency in a mortgage debt, left unpaid after the foreclosure of a mortgage for the purchase money of land, cannot be recovered from one who, though jointly interested in the purchase of the land, was not a party to the purchase money note which the mortgage was given to secure.⁷⁴

In a suit to foreclose a mortgage against husband and wife, a deficiency decree cannot be given against the wife, she not being personally liable for the mortgage debt.⁷⁵

§ 2892. Jurisdiction to Enter Personal Deficiency Decree.

Before a personal deficiency decree can be entered in a foreclosure suit, the court must have jurisdiction of the person of the mortgage debtor. Jurisdiction over the property, secured by the constructive service of publication, is not enough.⁷⁶ Where a deficiency decree cannot be entered for lack of jurisdiction over the person, the deficiency as ascertained by the court after sale constitutes an indebtedness that may be recovered in an appropriate independent action.⁷⁷

If a personal right of action against one defendant happens to be so associated with a mortgage foreclosure suit against another that it is proper for the court to entertain both causes of action on one suit, the proper decree may be entered on both branches of the case. In other words, a personal judgment may be rendered against a debtor in an action in which a mortgage executed by another person is foreclosed.⁷⁸

§ 2893. Jurisdiction as Dependent on Equity of Foreclosure.

Equity rule 92 does not authorize the rendition of a decree for the debt that is alleged to be secured, where the equity on which a foreclosure is sought wholly fails. The plaintiff is here remitted to his action at law.⁷⁹

The personal decree for a deficiency is dependent on the decree of foreclosure; and upon a reversal of the latter decree, the court may also reverse the personal decree.⁸⁰

⁷³ *Hayden v. Drury* (1880) 3 Fed. 782, (reversed on other ground (1884) 111 U. S. 223, 28 L. ed. 408); *Bissell v. Bugbee* (1879) Fed. Cas. No. 1,445.

⁷⁴ *Underwood v. Patrick* (C. C. A.; 1899) 94 Fed. 468, 36 C. C. A. 330.

⁷⁵ *Pawtucket Inst. v. Bowen* (1877) 7 Biss. 358, Fed. Cas. No. 10,852.

⁷⁶ *In re Linforth* (1898) 87 Fed. 387.

⁷⁷ *In re Linforth* (1898) 87 Fed. 386.

⁷⁸ *Hilton v. Otsego County Nat. Bank* (1886) 26 Fed. 202.

⁷⁹ *Cumberland etc. Ass'n v. Sparks* (1900) 106 Fed. 101.

⁸⁰ *Chicago etc. R. Co. v. Fosdick* (1892) 106 U. S. 82, 85, 27 L. ed. 64, 65,

§ 2894. Maturity of Debt as Affecting Right to Personal Decree.

A personal decree for the deficiency of the mortgage debt cannot be awarded when the part of the debt constituting the deficiency has not yet matured.⁸¹ In other words, the bill should show that the mortgage debt, as to which the deficiency decree is claimed, is due.⁸² But where the portion of the debt as to which a deficiency decree is desired to be entered has not yet matured, it would, of course, be entirely proper for the court to retain the cause indefinitely for further directions, until all the debt matures. Judgment for the deficiency can then be given at a later stage.

§ 2895. Statute of Limitations.

A deficiency decree will not be entered in a foreclosure proceeding where the secured debt is barred by the statute of limitations. But the defendant, in order to obtain the benefit of such defense, must plead the statute of limitations, and if he does not do so, a decree will be rendered for the deficiency, though the cause of action on the debt is barred.⁸³

§ 2896. Special Prayer for Deficiency Decree.

A personal decree for the deficiency may be awarded, though the bill contains no special prayer for such relief. The relief may be given under the general prayer. But the better practice is to pray specially for a decree for the deficiency.⁸⁴

Inasmuch as a deficiency decree may be given under a prayer for general relief, the court may properly refuse to allow the plaintiff to amend by inserting a special prayer for such relief, such amendment being unnecessary.⁸⁵

§ 2897. Interest on Deficiency Decree.

If the notes secured by a mortgage expressly provide for a particular rate of interest until they are paid, and in a foreclosure suit a

⁸¹ *Farmers' Loan etc. Co. v. Grape Loyhed* (1871) 1 Dill. 512, Fed. Cas. No. Creek Coal Co. (C. C. A.; 1895) 65 Fed. 11,077.

⁸² *Seattle etc. R. Co. v. Union Trust*

⁸³ *Ohio Cent. R. Co. v. Central Trust Co.* (C. C. A.; 1897) 24 C. C. A. 512,

Co. (1890) 133 U. S. 83, 33 L. ed. 561, 79 Fed. 179.

⁸⁴ *Shepherd v. Pepper* (1890) 133 U.

⁸⁵ *Shepherd v. Pepper* (1890) 133 U. S. 626, 33 L. ed. 706, 10 Sup. Ct. 438,

S. 651, 33 L. ed. 715, See *Phelps v.*

decree of sale is entered that does not merge the contract into a personal decree, it is proper to charge interest at the contract rate until the property has been sold and the proceeds applied to the satisfaction of the notes. But after the proceeds have been so applied and a personal decree is entered for the deficiency, this personal decree must thereafterwards bear interest at the rate fixed by law for decrees and judgments.⁸⁶

⁸⁶ *Shepherd v. Pepper* (1890) 133 U. S. 626, 33 L. ed. 706, 10 Sup. Ct. 438

APPENDIX.

RULES OF PRACTICE FOR THE COURTS OF EQUITY OF THE UNITED STATES.

PRELIMINARY REGULATIONS.

1.

The circuit courts, as courts of equity, shall be deemed always open for the purpose of filing bills, answers, and other pleadings; for issuing and returning mesne and final process and commissions; and for making and directing all interlocutory motions, orders, rules, and other proceedings, preparatory to hearing of all causes upon their merits.

2.

The clerk's office shall be open, and the clerk shall be in attendance therein, on the first Monday of every month, for the purpose of receiving, entering, entertaining, and disposing of all motions, rules, orders, and other proceedings, which are grantable of course and applied for, or had by the parties or their solicitors, in all causes pending in equity, in pursuance of the rules hereby prescribed.

3.

Any judge of the circuit court, as well in vacation as in term, may, at chambers, or on the rule-days at the clerk's office, make and direct all such interlocutory orders, rules, and other proceedings, preparatory to the hearing of all causes upon their merits, in the same manner and with the same effect as the circuit court could make and direct the same in term, reasonable notice of the application therefor being first given to the adverse party, or his solicitor, to appear and show cause to the contrary, at the next rule-day thereafter, unless some other time is assigned by the judge for the hearing.

4.

All motions, rules, orders, and other proceedings, made and directed at chambers, or on rule-days at the clerk's office, whether special or of course, shall be entered by the clerk in an order-book, to be kept at the clerk's office, on the day when they are made and directed; which book shall be open at all office hours to the free inspection of the parties in any suit in equity, and their solicitors. And, except in cases where personal or other notice is specially required or directed, such entry in the order-book shall be deemed sufficient notice to the parties and their solicitors, without further service thereof, of all orders, rules, acts, notices, and other proceedings entered in such order-book touching any and all the matters in the suits to and in which they are parties and solicitors. And notice to the solicitors shall be deemed notice to the parties from whom they appear and whom they represent, in all cases where personal notice on the parties is not otherwise specially required. Where the solicitors for all the parties in a suit reside in or near the same town or city the judges of the circuit court may, by rule, abridge the time for notice of rules, orders, or other proceedings not requiring personal service on the parties, in their discretion.

5.

All motions and applications in the clerk's office for the issuing of mesne process and final process to enforce and execute decrees; for filing bills, answers, pleas, demurrers, and other pleadings; for making amendments to bills and answers; for taking bills *pro confesso*; for filing exceptions; and for other proceedings in the clerk's office which do not, by the rules hereinafter prescribed, require any allowance or order of the court or of any judge thereof, shall be deemed motions and applications grantable of course by the clerk of the court. But the same may be suspended, or altered, or rescinded by any judge of the court, upon special cause shown.

6.

All motions for rules or orders and other proceedings, which are not grantable of course or without notice, shall, unless a different time be assigned by a judge of the court, be made on a rule-day, and entered in the order-book, and shall be heard at the rule-day next after that on which the motion is made. And if the adverse party, or his solicitor, shall not then appear, or shall not show good cause against the same, the motion may be heard by any judge of the court *ex parte*, and granted, as if not objected to, or refused, in his discretion.

PROCESS.

7.

The process of subpoena shall constitute the proper mesne process in all suits in equity, in the first instance, to require the defendant to appear and answer the exigency of the bill; and, unless otherwise provided in these rules, or specially ordered by the circuit court, a writ of attachment, and, if the defendant can not be found, a writ of sequestration, or a writ of assistance to enforce a delivery of possession, as the case may require, shall be the proper process to issue for the purpose of compelling obedience to any interlocutory or final order or decree of the court.

8.

Final process to execute any decree may, if the decree be solely for the payment of money, be by a writ of execution, in the form used in the circuit court in suits at common law in actions of *assumpsit*. If the decree be for the performance of any specific act, as, for example, for the execution of a conveyance of land or the delivering up of deeds or other documents, the decree shall, in all cases, prescribe the time within which the act shall be done, of which the defendant shall be bound, without further service, to take notice; and upon affidavit of the plaintiff, filed in the clerk's office, that the same has not been complied with within the prescribed time, the clerk shall issue a writ of attachment against the delinquent party, from which, if attached thereon, he shall not be discharged, unless upon a full compliance with the decree and the payment of all costs, or upon a special order of the court, or of a judge thereof, upon motion and affidavit, enlarging the time for the performance thereof. If the delinquent party can not be found, a writ of sequestration shall issue against his estate upon the return of *non est inventus*, to compel obedience to the decree.

9.

When any decree or order is for the delivery or possession, upon proof made by affidavit of a demand and refusal to obey the decree or order, the party prosecuting the same shall be entitled to a writ of assistance from the clerk of the court.¹

10.

Every person, not being a party in any cause, who has obtained an order, or in whose favor an order shall have been made, shall be

¹ Substantially the same as No. 13, Eng. Ord. in Chan. Aug. 26, 1941.

enabled to enforce obedience to such order by the same process as if he were a party to the cause; and every person, not being a party in any cause, against whom obedience to any order of the court may be enforced, shall be liable to the same process for enforcing obedience to such orders as if he were a party in the cause.²

SERVICE OF PROCESS.

11.

No process of subpoena shall issue from the clerk's office in any suit in equity until the bill is filed in the office.

12.

Whenever a bill is filed, the clerk shall issue the process of subpoena thereon, as of course, upon the application of the plaintiff, which shall contain the Christian names as well as the surnames of the parties, and shall be returnable into the clerk's office the next rule-day, or the next rule-day but one, at the election of the plaintiff, occurring after twenty days from the time of the issuing thereof. At the bottom of the subpoena shall be placed a memorandum, that the defendant is to enter his appearance in the suit in the clerk's office on or before the day at which the writ is returnable; otherwise the bill may be taken *pro confesso*. Where there are more than one defendant, a writ of subpoena may, at the election of the plaintiff, be sued out separately for each defendant, except in the case of husband and wife defendants, or a joint subpoena against all the defendants.³

13.

The service of all subpoenas shall be by a delivery of a copy thereof by the officer serving the same to the defendant personally, or by leaving a copy thereof at the dwelling-house or usual place of abode of each defendant, with some adult person who is a member or resident in the family.⁴

14.

Whenever any subpoena shall be returned not executed as to any defendant, the plaintiff shall be entitled to another subpoena, *toties*

² Adopted from No. 15, Eng. Ord. provision in this rule, compare No. 2, in Chan. Aug. 26, 1841. Eng. Ord. in Chan. April 3, 1828, as amended Nov. 23, 1831.

³ With the provision in this rule concerning the memorandum of the date of appearance, compare No. 14, Eng. Ord. in Chan. Aug. 26, 1841. With the last

⁴ Based on No. 4, Eng. Ord. in Chan. Dec. 21, 1833,

quoties, against such defendant, if he shall require it, until due service is made.

15.

The service of all process, mesne and final, shall be by the marshal of the district, or his deputy, or by some other person specially appointed by the court for that purpose, and not otherwise. In the latter case, the person serving the process shall make affidavit thereof.

16.

Upon the return of the subpoena as served and executed upon any defendant, the clerk shall enter the suit upon his docket as pending in the court, and shall state the time of the entry.

APPEARANCE.

17.

The appearance-day of the defendant shall be the rule-day to which the subpoena is made returnable, provided he has been served with the process twenty days before that day; otherwise his appearance-day shall be the next rule-day succeeding the rule-day when the process is returnable.

The appearance of the defendant, either personally or by his solicitor, shall be entered in the order-book on the day thereof by the clerk.

BILLS TAKEN PRO CONFESSO.

18.

It shall be the duty of the defendant, unless the time shall be otherwise enlarged, for cause shown, by a judge of the court, upon motion for that purpose, to file his plea, demurter, or answer to the bill, in the clerk's office, on the rule-day next succeeding that of entering his appearance. In default thereof, the plaintiff may, at his election, enter an order (as of course) in the order-book, that the bill be taken *pro confesso*; and thereupon the cause shall be proceeded in *ex parte*, and the matter of the bill may be decreed by the court at any time after the expiration of thirty days from and after the entry of said order, if the same can be done without an answer, and is proper to be decreed; or the plaintiff, if he requires any discovery or answer to enable him to obtain a proper decree, shall be entitled to process of

attachment against the defendant to compel an answer, and the defendant shall not, when arrested upon such process, be discharged therefrom, unless upon filing his answer, or otherwise complying with such order as the court or a judge thereof may direct as to pleading to or fully answering the bill, within a period to be fixed by the court or judge, and undertaking to speed the cause.⁵

19.

When the bill is taken *pro confesso* the court may proceed to a decree at any time after the expiration of thirty days from and after the entry of the order to take the bill *pro confesso*, and such decree rendered shall be deemed absolute, unless the court shall, at the same term, set aside the same, or enlarge the time for filing the answer, upon cause shown upon motion and affidavit of the defendant. And no such motion shall be granted, unless upon the payment of the cost of the plaintiff in the suit up to that time, or such part thereof as the court shall deem reasonable, and unless the defendant shall undertake to file his answer within such time as the court shall direct, and submit to such other terms as the court shall direct, for the purpose of speeding the cause.⁶

FRAME OF BILLS.

20.

Every bill, in the introductory part thereof, shall contain the names, places of abode, and citizenship of all the parties, plaintiffs and defendants, by and against whom the bill is brought. The form, in substance, shall be as follows: "To the judges of the circuit court of the United States for the district of —: A. B., of —, and a citizen of the State of —, brings this his bill against C. D., of —, and a citizen of the State of —, and E. F., of —, and a citizen of the State of —. And thereupon your orator complains and says that," etc.

21.

The plaintiff, in his bill, shall be at liberty to omit, at his option, the part which is usually called the common confederacy clause of the bill, averring a confederacy between the defendants to injure or

⁵ This rule was given its present form by an amendment adopted at the October Term, 1878. See 97 U. S. vii.

⁶ See note to preceding rule.

defraud the plaintiff; also what is commonly called the charging part of the bill, setting forth the matters or excuses which the defendant is supposed to intend to set up by way of defense to the bill; also what is commonly called the jurisdiction clause of the bill, that the acts complained of are contrary to equity, and that the defendant is without any remedy at law; and the bill shall not be demurrable therefor. And the plaintiff may, in the narrative or stating part of his bill, state and avoid, by counter-averments, at his option, any matter or thing which he supposes will be insisted upon by the defendant by way of defense or excuse to the case made by the plaintiff for relief. The prayer of the bill shall ask the special relief to which the plaintiff supposes himself entitled, and also shall contain a prayer for general relief; and if an injunction, or a writ of *ne exeat regno*, or any other special order, pending the suit, is required, it shall also be specially asked for.

22.

If any persons, other than those named as defendants in the bill, shall appear to be necessary or proper parties thereto, the bill shall aver the reason why they are not made parties, by showing them to be without the jurisdiction of the court, or that they can not be joined without ousting the jurisdiction of the court as to the other parties. And as to persons who are without the jurisdiction and may properly be made parties, the bill may pray that process may issue to make them parties to the bill if they should come within the jurisdiction.

23.

The prayer for process of subpoena in the bill shall contain the names of all the defendants named in the introductory part of the bill, and if any of them are known to be infants under age, or otherwise under guardianship, shall state the fact, so that the court may take order thereon, as justice may require upon the return of the process. If an injunction, or a writ of *ne exeat regno*, or any other special order, pending the suit, is asked for in the prayer for relief, that shall be sufficient, without repeating the same in the prayer for process.

24.

Every bill shall contain the signature of counsel annexed to it, which shall be considered as an affirmation on his part that, upon the

instructions given to him and the case laid before him, there is good ground for the suit, in the manner in which it is framed.

25.

In order to prevent unnecessary costs and expenses, and to promote brevity, succinctness, and directness in the allegations of bills and answers, the regular taxable costs for every bill and answer shall in no case exceed the sum which is allowed in the State court of chancery in the district, if any there be; but if there be none, then it shall not exceed the sum of three dollars for every bill or answer.

SCANDAL AND IMPERTINENCE IN BILLS.

26.

Every bill shall be expressed in as brief and succinct terms as it reasonably can be, and shall contain no unnecessary recitals of deeds, documents, contracts, or other instruments in *hæc verba*, or any other impertinent matter, or any scandalous matter not relevant to the suit. If it does, it may, on exceptions, be referred to a master, by any judge of the court, for impertinence or scandal; and if so found by him, the matter shall be expunged at the expense of the plaintiff, and he shall pay to the defendant all his costs in the suit up to that time, unless the court or a judge thereof shall otherwise order. If the master shall report that the bill is not scandalous or impertinent, the plaintiff shall be entitled to all costs occasioned by the reference.

27.

No order shall be made by any judge for referring any bill, answer, or pleading, or other matter or proceeding, depending before the court, for scandal or impertinence, unless exceptions are taken in writing and signed by counsel, describing the particular passages which are considered to be scandalous or impertinent; nor unless the exceptions shall be filed on or before the next rule-day after the process on the bill shall be returnable, or after the answer or pleading is filed. And such order, when obtained, shall be considered as abandoned, unless the party obtaining the order shall, without any unnecessary delay, procure the master to examine and report for the same on or before the next succeeding rule-day, or the master shall certify that further time is necessary for him to complete the examination.⁷

⁷ Compare No. 12, Eng. Ord. in Chan. April 3, 1828, as amended Nov. 23, 1831.

AMENDMENT OF BILLS.

28.

The plaintiff shall be at liberty, as a matter of course, and without payment of costs, to amend his bill, in any matters whatsoever, before any copy has been taken out of the clerk's office, and in any small matters afterwards, such as filling blanks, correcting errors of dates, misnomer of parties, misdescription of premises, clerical errors, and generally in matters of form. But if he amend in a material point (as he may do of course) after a copy has been so taken, before any answer or plea or demurrer to the bill, he shall pay to the defendant the costs occasioned thereby, and shall, without delay, furnish him a fair copy thereof, free of expense, with suitable references to the places where the same are to be inserted. And if the amendments are numerous, he shall furnish, in like manner, to the defendant, a copy of the whole bill as amended; and if there be more than one defendant, a copy shall be furnished to each defendant affected thereby.⁸

29.

After an answer, or plea, or demurrer is put in, and before replication, the plaintiff may, upon motion or petition, without notice, obtain an order from any judge of the court to amend his bill on or before the next succeeding rule-day, upon payment of costs or without payment of costs, as the court or a judge thereof may in his discretion direct. But after replication filed, the plaintiff shall not be permitted to withdraw it and to amend his bill, except upon a special order of a judge of the court, upon motion or petition, after due notice to the other party, and upon proof by affidavit that the same is not made for the purpose of vexation or delay, or that the matter of the proposed amendment is material, and could not with reasonable diligence have been sooner introduced into the bill, and upon the plaintiff's submitting to such other terms as may be imposed by the judge for speeding the cause.

30.

If the plaintiff so obtaining any order to amend his bill after answer, or plea, or demurrer, or after replication, shall not file his

⁸ The subject of the amendment of bills 1828, as amended Nov. 23, 1831; but which is treated in this and in the two succeeding rules is dealt with in Nos. 13-15, Eng. Ord. in Chan. April 3, from the English orders.

amendments or amended bill, as the case may require, in the clerk's office on or before the next succeeding rule-day, he shall be considered to have abandoned the same, and the cause shall proceed as if no application for any amendment had been made.

DEMURRERS AND PLEAS.

31.

No demurrer or plea shall be allowed to be filed to any bill, unless upon a certificate of counsel, that in his opinion it is well founded in point of law, and supported by the affidavit of the defendant; that it is not interposed for delay; and, if a plea, that it is true in point of fact.

32.

The defendant may at any time before the bill is taken for confessed, or afterward with the leave of the court, demur or plead to the whole bill, or to part of it, and he may demur to part, plead to part, and answer as to the residue; but in every case in which the bill specially charges fraud or combination, a plea to such part must be accompanied with an answer fortifying the plea and explicitly denying the fraud and combination, and the facts on which the charge is founded.

33.

The plaintiff may set down the demurrer or plea to be argued, or he may take issue on the plea. If, upon an issue, the facts stated in the plea be determined for the defendant, they shall avail him as far as in law and equity they ought to avail him.

34.

If, upon the hearing, any demurrer or plea is overruled, the plaintiff shall be entitled to his costs in the cause up to that period unless the court shall be satisfied that the defendant has good ground, in point of law or fact, to interpose the same, and it was not interposed vexatiously or for delay. And, upon the overruling of any plea or demurrer, the defendant shall be assigned to answer the bill, or so much thereof as is covered by the plea or demurrer, the next succeeding rule-day, or at such other period as, consistently with justice and the rights of the defendant, the same can, in the judgment of the court, be reasonably done; in default whereof, the bill shall be taken

against him *pro confesso*, and the matter thereof proceeded in and decreed accordingly.⁹

35.

If, upon the hearing, any demurrer or plea shall be allowed, the defendant shall be entitled to his costs. But the court may, in its discretion, upon motion of the plaintiff, allow him to amend his bill, upon such terms as it shall deem reasonable.

36.

No demurrer or plea shall be held bad and overruled upon argument, only because such demurrer or plea shall not cover so much of the bill as it might by law have extended to.¹⁰

37.

No demurrer or plea shall be held bad and overruled upon argument, only because the answer of the defendant may extend to some part of the same matter as may be covered by such demurrer or plea.¹¹

38.

If the plaintiff shall not reply to any plea, or set down any plea or demurrer for argument on the rule-day when the same is filed; or on the next succeeding rule-day, he shall be deemed to admit the truth and sufficiency thereof, and his bill shall be dismissed as of course, unless a judge of the court shall allow him further time for that purpose.¹²

ANSWERS.

39.

The rule, that if a defendant submits to answer he shall answer fully to all the matters of the bill, shall no longer apply in cases where he might by plea protect himself from such answer and discovery. And the defendant shall be entitled in all cases by answer to insist upon all matters of defense (not being matters of abatement, or to

⁹ With the provision as to costs contained in this rule, compare No. 32, Eng. Ord. in Chan. April 30, 1828, as amended Nov. 23, 1831.

¹⁰ Identical with No. 36, Eng. Ord. in Chan. Aug. 26, 1841.

¹¹ Identical with No. 37, Eng. Ord. in Chan. Aug. 26, 1841.

¹² With this rule, compare the similar provisions contained in No. 34, Eng. Ord. in Chan. Aug. 26, 1841, and in No. 35 of the same series.

the character of the parties,¹³ or matters of form) in bar of or to the merits of the bill, of which he may be entitled to avail himself by a plea in bar; and in such answer he shall not be compellable to answer any other matters than he would be compellable to answer and discover upon filing a plea in bar and an answer in support of such plea, touching the matters set forth in the bill to avoid or repel the bar or defense. Thus, for example, a *bona-fide* purchaser, for a valuable consideration without notice, may set up that defense by way of answer instead of plea, and shall be entitled to the same protection, and shall not be compellable to make any further answer or discovery of his title than he would be in any answer in support of such plea.

40.

A defendant shall not be bound to answer any statement or charge in the bill, unless specially and particularly interrogated thereto; and a defendant shall not be bound to answer any interrogatory in the bill, except those interrogatories which such defendant is required to answer; and where a defendant shall answer any statement or charge in the bill to which he is not interrogated, only by stating his ignorance of the matter so stated or charged, such answer shall be deemed impertinent.¹⁴

DECEMBER TERM, 1850.

Ordered, That the fortieth rule, heretofore adopted and promulgated by this court as one of the rules of practice in suits in equity in the circuit courts, be, and the same is hereby, repealed and annulled. And it shall not hereafter be necessary to interrogate a defendant specially and particularly upon any statement in the bill, unless the complainant desires to do so, to obtain a discovery.

41.

The interrogatories contained in the interrogating part of the bill shall be divided as conveniently as may be from each other and numbered consecutively 1, 2, 3, etc.; and the interrogatories which each defendant is required to answer shall be specified in a note at the foot of the bill, in the form or to the effect following, that is to say: "The defendant (A. B.) is required to answer the interrogatories numbered

¹³ By Act of March 3, 1875, ch. 137, templated in the parenthesis contained in sec. 5, all matters affecting the statutory jurisdiction of the court are made available by answer and do not have to be specially pleaded in abatement as con-

the second sentence of this rule. ¹⁴ This rule as originally adopted conforms with the provisions of No. 16, Eng. Ord. in Chan. Aug. 26, 1841.

respectively 1, 2, 3," etc. ; and the office copy of the bill taken by each defendant shall not contain any interrogatories except those which such defendant is so required to answer, unless such defendant shall require to be furnished with a copy of the whole bill.¹⁵

DECEMBER TERM, 1871.

Amendment to Forty-first Equity Rule.

If the complainant, in his bill, shall waive an answer under oath, or shall only require an answer under oath with regard to certain specified interrogatories, the answer of the defendant, though under oath, except such part thereof as shall be directly responsive to such interrogatories, shall not be evidence in his favor, unless the cause be set down for hearing on bill and answer only ; but may nevertheless be used as an affidavit, with the same effect as heretofore, on a motion to grant or dissolve an injunction, or on any other incidental motion in the cause ; but this shall not prevent a defendant from becoming a witness in his own behalf under section 3 of the act of Congress of July 2, 1864.

42.

The note at the foot of the bill, specifying the interrogatories which each defendant is required to answer, shall be considered and treated as part of the bill, and the addition of any such note to the bill, or any alteration in or addition to such note, after the bill is filed, shall be considered and treated as an amendment of the bill.¹⁶

43.

Instead of the words of the bill now in use, preceding the interrogating part thereof, and beginning with the words "To the end therefore," there shall hereafter be used words in the form or to the effect following: "To the end, therefore, that the said defendants may, if they can, show why your orator should not have the relief hereby prayed, and may, upon their several and respective corporal oaths, and according to the best and utmost of their several and respective knowledge, remembrance, information, and belief, full, true, direct, and perfect answers make to such of the several interrogatories here-

¹⁵ Identical with No. 17, Eng. Ord. in Chan. Aug. 26, 1841,

¹⁶ Identical with No. 18, Eng. Ord. in Chan. Aug. 26, 1841,

inafter numbered and set forth, as by the note hereunder written they are respectively required to answer; that is to say—

“1. Whether, etc.

“2. Whether, etc.”¹⁷

44.

A defendant shall be at liberty, by answer, to decline answering any interrogatory, or part of an interrogatory, from answering which he might have protected himself by demurrer; and he shall be at liberty so to decline, notwithstanding he shall answer other parts of the bill from which he might have protected himself by demurrer.¹⁸

45.

No special replication to any answer shall be filed. But if any matter alleged in the answer shall make it necessary for the plaintiff to amend his bill, he may have leave to amend the same with or without the payment of costs, as the court, or a judge thereof, may in his discretion direct.

46.

In every case where an amendment shall be made after answer filed, the defendant shall put in a new or supplemental answer on or before the next succeeding rule-day after that on which the amendment or amended bill is filed, unless the time is enlarged or otherwise ordered by a judge of the court; and upon his default, the like proceedings may be had as in cases of an omission to put in an answer.

PARTIES TO BILLS.

47.

In all cases where it shall appear to the court that persons, who might otherwise be deemed necessary or proper parties to the suit, can not be made parties by reason of their being out of the jurisdiction of the court, or incapable otherwise of being made parties, or because their joinder would oust the jurisdiction of the court as to the parties before the court, the court may, in their discretion, proceed in the cause without making such persons parties; and in such cases the decree shall be without prejudice to the rights of the absent parties.

¹⁷ Identical with No. 19, Eng. Ord. in Chan. Aug. 26, 1841.

¹⁸ Identical with No. 33, Eng. Ord. in Chan. Aug. 26, 1841.

48.

Where the parties on either side are very numerous, and cannot, without manifest inconvenience and oppressive delays in the suit, be all brought before it, the court in its discretion may dispense with making all of them parties, and may proceed in the suit, having sufficient parties before it to represent all the adverse interest of the plaintiffs and the defendants in the suit properly before it. But, in such cases, the decree shall be without prejudice to the rights and claims of all the absent parties.

49.

In all suits concerning real estate which is vested in trustees by devise, and such trustees are competent to sell and give discharges for the proceeds of the sale, and for the rents and profits of the estate, such trustees shall represent the persons beneficially interested in the estate, or the proceeds, or the rents and profits, in the same manner and to the same extent as the executors or administrators in suits concerning personal estate represent the persons beneficially interested in such personal estate; and in such cases it shall not be necessary to make the persons beneficially interested in such real estates, or rents and profits, parties to the suit; but the court may, upon consideration of the matter on the hearing, if it shall so think fit, order such persons to be made parties.¹⁹

50.

In suits to execute the trusts of a will, it shall not be necessary to make the heir at law a party; but the plaintiffs shall be at liberty to make the heir at law a party where he desires to have the will established against him.²⁰

51.

In all cases in which the plaintiff has a joint and several demand against several persons, either as principals or sureties, it shall not be necessary to bring before the court as parties to a suit concerning such demand all the persons liable thereto; but the plaintiff may proceed against one or more of the persons severally liable.²¹

¹⁹ Identical with No. 30, Eng. Ord. in Chan. Aug. 26, 1841.

²¹ Identical with No. 32, Eng. Ord. in Chan. Aug. 26, 1841.

²⁰ Identical with No. 31, Eng. Ord. in Chan. Aug. 26, 1841.

52.

Where the defendant shall, by his answer, suggest that the bill is defective for want of parties, the plaintiff shall be at liberty, within fourteen days after answer filed, to set down the cause for argument upon that objection only; and the purpose for which the same is so set down shall be notified by an entry, to be made in the clerk's order-book, in the form or to the effect following (that is to say): "Set down upon the defendant's objection for want of parties." And where the plaintiff shall not so set down his cause, but shall proceed therewith to a hearing, notwithstanding an objection for want of parties taken by the answer, he shall not, at the hearing of the cause, if the defendant's objection shall then be allowed be entitled as of course to an order for liberty to amend his bill by adding parties. But the court, if it thinks fit, shall be at liberty to dismiss the bill.²²

53.

If a defendant shall, at the hearing of a cause, object that a suit is defective for want of parties not having by plea or answer taken the objection, and therein specified by name or description of parties to whom the objection applies, the court (if it shall think fit) shall be at liberty to make a decree saving the rights of the absent parties.²³

NOMINAL PARTIES TO BILLS.

54.

Where no account, payment, conveyance, or other direct relief is sought against a party to a suit, not being an infant, the party, upon service of the subpoena upon him, need not appear and answer the bill, unless the plaintiff specially requires him to do so by the prayer of his bill; but he may appear and answer at his option; and if he does not appear and answer he shall be bound by all the proceedings in the cause. If the plaintiff shall require him to appear and answer he shall be entitled to the costs of all the proceedings against him unless the court shall otherwise direct.²⁴

55.

Whenever an injunction is asked for by the bill to stay proceedings at law, if the defendant do not enter his appearance and plead, demur,

²² Identical with No. 39, Eng. Ord. in Chan. Aug. 26, 1841.

²³ Identical with No. 40, Eng. Ord. in Chan. Aug. 26, 1841.

²⁴ Compare No. 29, Eng. Ord. in Chan. Aug. 26, 1841.

or answer to the same within the time prescribed therefor by these rules, the plaintiff shall be entitled as of course, upon motion, without notice, to such injunction. But special injunctions shall be grantable only upon due notice to the other party by the court in term or by a judge thereof in vacation, after a hearing, which may be *ex parte*, if the adverse party does not appear at the time and place ordered. In every case where an injunction—either the common injunction or a special injunction—is awarded in vacation, it shall, unless previously dissolved by the judge granting the same, continue until the next term of the court, or until it is dissolved by some other order of the court.

BILLS OF REVIVOR AND SUPPLEMENTAL BILLS.

56.

Whenever a suit in equity shall become abated by the death of either party, or by any other event, the same may be revived by a bill of revivor or a bill in the nature of a bill of revivor, as the circumstances of the case may require, filed by the proper parties entitled to revive the same, which bill may be filed in the clerk's office at any time; and, upon suggestion of the facts, the proper process of subpoena shall, as of course, be issued by the clerk, requiring the proper representatives of the other party to appear and show cause, if any they have, why the cause should not be revived. And if no cause shall be shown at the next rule-day which shall occur after fourteen days from the time of the service of the same process, the suit shall stand revived, as of course.

57.

Whenever any suit in equity shall become defective from any event happening after the filing of the bill (as, for example, by change of interest in the parties), or for any other reason a supplemental bill, or a bill in the nature of a supplemental bill, may be necessary to be filed in the cause, leave to file the same may be granted by any judge of the court on any rule-day upon proper cause shown and due notice to the other party. And if leave is granted to file such supplemental bill, the defendant shall demur, plead, or answer thereto on the next succeeding rule-day after the supplemental bill is filed in the clerk's office, unless some other time shall be assigned by a judge of the court.

58.

It shall not be necessary in any bill of revivor or supplemental bill to set forth any of the statements in the original suit, unless the special circumstances of the case may require it.²⁵

ANSWERS.

59.

Every defendant may swear to his answer before any justice or judge of any court of the United States, or before any commissioner appointed by any circuit court to take testimony or depositions, or before any master in chancery appointed by any circuit court, or before any judge of any court of a State or Territory, or before any notary public.²⁶

AMENDMENT OF ANSWERS.

60.

After an answer is put in, it may be amended, as of course, in any matter of form, or by filling up a blank, or correcting a date, or reference to a document, or other small matter, and be resworn, at any time before a replication is put in, or the cause is set down for a hearing upon bill and answer. But after replication, or such setting down for a hearing, it shall not be amended in any material matters, as by adding new facts or defenses, or qualifying or altering the original statements, except by special leave of the court, or of a judge thereof, upon motion and cause shown, after due notice to the adverse party, supported, if required, by affidavit; and in every case where leave is so granted, the court or the judge granting the same may, in his discretion, require the same to be separately engrossed, and added as a distinct amendment to the original answer, so as to be distinguishable therefrom.

EXCEPTIONS TO ANSWERS.

61.

After an answer is filed on any rule-day, the plaintiff shall be allowed until the next succeeding rule-day to file in the clerk's office

²⁵ Substantially the same as No. 49, to be sworn to before a notary public, see Eng. Ord. in Chan. Aug. 26, 1841. 129 U. S. 701.

²⁶ Amended so as to allow the answer

exceptions thereto for insufficiency, and no longer, unless a longer time shall be allowed for the purpose, upon cause shown to the court, or a judge thereof; and, if no exception shall be filed thereto within that period, the answer shall be deemed and taken to be sufficient.²⁷

62.

When the same solicitor is employed for two or more defendants, and separate answers shall be filed, or other proceedings had, by two or more of the defendants separately, costs shall not be allowed for such separate answers, or other proceedings, unless a master, upon reference to him, shall certify that such separate answers and other proceedings were necessary or proper, and ought not to have been joined together.²⁸

63.

Where exceptions shall be filed to the answer for insufficiency, within the period prescribed by these rules, if the defendant shall not submit to the same and file an amended answer on the next succeeding rule-day, the plaintiff shall forthwith set them down for a hearing on the next succeeding rule-day thereafter, before a judge of the court, and shall enter, as of course, in the order-book, an order for that purpose; and if he shall not so set down the same for a hearing, the exceptions shall be deemed abandoned, and the answer shall be deemed sufficient; provided, however, that the court, or any judge thereof, may, for good cause shown, enlarge the time for filing exceptions, or for answering the same, in his discretion, upon such terms as he may deem reasonable.²⁹

64.

If, at the hearing, the exceptions shall be allowed, the defendant shall be bound to put in a full and complete answer thereto on the next succeeding rule-day; otherwise the plaintiff shall, as of course, be entitled to take the bill, so far as the matter of such exceptions is concerned, as confessed, or, at his election, he may have a writ of attachment to compel the defendant to make a better answer to the matter of the exceptions; and the defendant, when he is in custody

²⁷ Compare Nos. 4 and 5, Eng. Ord. in Chan. April 3, 1828, as amended Nov. 23, 1831. ²⁸ Compare Nos. 5, 12, and 16, Eng. Ord. in Chan. April 3, 1828, as amended Nov. 23, 1831.

²⁹ Substantially the same as No. 27, Eng. Ord. in Chan. April 3, 1828, as amended Nov. 23, 1831.

upon such writ, shall not be discharged therefrom but by an order of the court, or of a judge thereof, upon his putting in such answer, and complying with such other terms as the court or judge may direct.³⁰

65.

If, upon argument, the plaintiff's exceptions to the answer shall be overruled, or the answer shall be adjudged insufficient, the prevailing party shall be entitled to all the costs occasioned thereby, unless otherwise directed by the court, or the judge thereof, at the hearing upon the exceptions.

REPLICATION AND ISSUE.

66.

Whenever the answer of the defendant shall not be excepted to, or shall be adjudged or deemed sufficient, the plaintiff shall file the general replication thereto on or before the next succeeding rule-day thereafter; and in all cases where the general replication is filed, the cause shall be deemed, to all intents and purposes, at issue, without any rejoinder or other pleading on either side. If the plaintiff shall omit or refuse to file such replication within the prescribed period, the defendant shall be entitled to an order, as of course, for a dismissal of the suit; and the suit shall thereupon stand dismissed, unless the court, or a judge thereof, shall, upon motion, for cause shown, allow a replication to be filed *nunc pro tunc*, the plaintiff submitting to speed the cause, and to such other terms as may be directed.

TESTIMONY—HOW TAKEN.

67.

After the cause is at issue, commissions to take testimony may be taken out in vacation as well as in term, jointly by both parties, or severally by either party, upon interrogatories filed by the party taking out the same in the clerk's office, ten days' notice thereof being given to the adverse party to file cross-interrogatories before the issuing of the commission; and if no cross-interrogatories are filed at the expiration of the time the commission may issue *ex parte*. In all cases the commissioner or commissioners may be named by the court or by a judge thereof; and the presiding judge of the court exercising

³⁰ Compare No. 8, Eng. Ord. in Chan. April 3, 1828, as amended Nov. 23, 1831.

jurisdiction may, either in term time or in vacation, vest in the clerk of the court general power to name commissioners to take testimony.³¹

Either party may give notice to the other that he desires the evidence to be adduced in the cause to be taken orally, and thereupon all the witnesses to be examined shall be examined before one of the examiners of the court, or before an examiner to be specially appointed by the court. The examiner, if he so request, shall be furnished with a copy of the pleadings.

Such examination shall take place in the presence of the parties or their agents, by their counsel or solicitors, and the witnesses shall be subject to cross-examination and re-examination, all of which shall be conducted as near as may be in the mode now used in common-law courts.

The depositions taken upon such oral examination shall be reduced to writing by the examiner, in the form of question put and answer given; provided, that, by consent of the parties, the examiner may take down the testimony of any witness in the form of narrative.

At the request of either party, with reasonable notice, the deposition of any witness shall, under the direction of the examiner, be taken down either by a skillful stenographer or by a skillful typewriter, as the examiner may elect, and when taken stenographically shall be put into typewriting or other writing; provided, that such stenographer or typewriter has been appointed by the court, or is approved by both parties.

The testimony of each witness, after such reduction to writing, shall be read over to him and signed by him in the presence of the examiner and of such of the parties or counsel as may attend; provided, that if the witness shall refuse to sign his deposition so taken, then the examiner shall sign the same, stating upon the record the reasons, if any, assigned by the witness for such refusal.

The examiner may, upon all examinations, state any special matters to the court as he shall think fit; and any question or questions which may be objected to shall be noted by the examiner upon the deposition, but he shall not have power to decide on the competency, materiality, or relevancy of the questions; and the court shall have power to deal with the costs of incompetent, immaterial, or irrelevant depositions, or parts of them, as may be just.

³¹ The successive amendments to which amendment of October Term, 1891 (144 this rule has been subjected since it was U. S. 689); amendment of May 15, 1893 first promulgated are indicated in the (149 U. S. 793). For the statement of following references: Amendment adopted the substance of the original rule, see ed at December Term 1861 (1 Black 7); 3 Wall. Jr. 187.

In case of refusal of witnesses to attend, to be sworn, or to answer any question put by the examiner, or by counsel or solicitor, the same practice shall be adopted as is now practiced with respect to witnesses to be produced on examination before an examiner of said court on written interrogatories.

Notice shall be given by the respective counsel or solicitors to the opposite counsel or solicitors, or parties, of the time and place of the examination, for such reasonable time as the examiner may fix by order in each cause.

When the examination of witnesses before the examiner is concluded, the original depositions, authenticated by the signature of the examiner, shall be transmitted by him to the clerk of the court, to be there filed of record, in the same mode as prescribed in Section 865 of the Revised Statutes.

Testimony may be taken on commission in the usual way, by written interrogatories and cross-interrogatories, on motion to the court in term time, or to a judge in vacation, for special reasons, satisfactory to the court or judge.

Where the evidence to be adduced in a cause is to be taken orally, as before provided, the court may, on motion of either party, assign a time within which the complainant shall take his evidence in support of the bill, and a time thereafter within which the defendant shall take his evidence in defense, and a time thereafter within which the complainant shall take his evidence in reply; and no further evidence shall be taken in the cause, unless by agreement of the parties or by leave of court first obtained, on motion for cause shown.

The expense of the taking down of depositions by a stenographer and of putting them into typewriting or other writing shall be paid in the first instance by the party calling the witness, and shall be imposed by the court, as part of the costs, upon such party as the court shall adjudge should ultimately bear them.

Upon due notice given as prescribed by previous order, the court may, at its discretion, permit the whole, or any specific part, of the evidence to be adduced orally in open court on final hearing.

68.

Testimony may also be taken in the cause, after it is at issue, by deposition, according to the act of Congress. But in such case, if no notice is given to the adverse party of the time and place of taking the deposition, he shall, upon motion and affidavit of the fact, be entitled to a cross-examination of the witness, either under a

commission or by a new deposition taken under the acts of Congress, if a court or judge thereof shall, under all the circumstances, deem it reasonable.

69.

Three months, and no more, shall be allowed for the taking of testimony after the cause is at issue, unless the court, or a judge thereof, shall, upon special cause shown by either party, enlarge the time; and no testimony taken after such period shall be allowed to be read in evidence at the hearing. Immediately upon the return of the commissions and depositions containing the testimony into the clerk's office, publication thereof may be ordered in the clerk's office, by any judge of the court, upon due notice to the parties, or it may be enlarged, as he may deem reasonable, under all the circumstances; but, by consent of the parties, publication of the testimony may at any time pass into the clerk's office, such consent being in writing, and a copy thereof entered in the order-books, or indorsed upon the deposition or testimony.

TESTIMONY DE BENE ESSE.

70.

After any bill filed and before the defendant hath answered the same, upon affidavit made that any of the plaintiff's witnesses are aged and infirm, or going out of the country, or that any one of them is a single witness to a material fact, the clerk of the court shall, as of course, upon the application of the plaintiff, issue a commission to such commissioner or commissioners as a judge of the court may direct, to take the examination of such witness or witnesses *de bene esse*, upon giving due notice to the adverse party of the time and place of taking his testimony.

FORM OF THE LAST INTERROGATORY.

71.

The last interrogatory in the written interrogatories to take testimony now commonly in use shall in the future be altered, and stated in substance thus: "Do you know, or can you set forth, any other matter or thing which may be a benefit or advantage to the parties at issue in this cause, or either of them, or that may be material to the subject of this your examination, or the matters in question in

this cause? If yea, set forth the same fully and at large in your answer." ³²

CROSS-BILL.

72.

Where a defendant in equity files a cross-bill for discovery only against the plaintiff in the original bill, the defendant to the original bill shall first answer thereto before the original plaintiff shall be compellable to answer the cross-bill. The answer of the original plaintiff to such cross-bill may be read and used by the party filing the cross-bill at the hearing, in the same manner and under the same restrictions as the answer praying relief may now be read and used.³³

REFERENCE TO AND PROCEEDINGS BEFORE MASTERS.

73.

Every decree for an account of the personal estate of a testator or intestate shall contain a direction to the master to whom it is referred to take the same to inquire and state to the court what parts, if any, of such personal estate are outstanding or undisposed of, unless the court shall otherwise direct.³⁴

74.

Whenever any reference of any matter is made to a master to examine and report thereon, the party at whose instance or for whose benefit the reference is made shall cause the same to be presented to the master for a hearing on or before the next rule-day succeeding the time when the reference was made; if he shall omit to do so, the adverse party shall be at liberty forthwith to cause proceedings to be had before the master, at the costs of the party procuring the reference.³⁵

75.

Upon every such reference, it shall be the duty of the master, as soon as he reasonably can after the same is brought before him, to assign a time and place for proceedings in the same, and to give due

³² Identical with No. 32, Eng. Ord. in Chan. Dec. 21, 1833.

³³ See Nos. 41 and 42, Eng. Ord. in Chan. Aug. 26, 1841.

³⁴ Identical with No. 45, Eng. Ord. in Chan. Aug. 26, 1841.

³⁵ Compare No. 46, Eng. Ord. in Chan. April 3, 1828, as amended Nov. 23, 1831.

notice thereof to each of the parties, or their solicitors; and if either party shall fail to appear at the time and place appointed, the master shall be at liberty to proceed *ex parte*, or, in his discretion, to adjourn the examination and proceedings to a future day, giving notice to the absent party or his solicitor of such adjournment; and it shall be the duty of the master to proceed with all reasonable diligence in every such reference, and with the least practicable delay, and either party shall be at liberty to apply to the court, or a judge thereof, for an order to the master to speed the proceedings and to make his report, and to certify to the court or judge the reason for any delay.³⁶

76.

In the reports made by the master to the court, no part of any state of facts, charge, affidavit, deposition, examination, or answer brought in or used before them shall be stated or recited. But such state of facts, charge, affidavit, deposition, examination, or answer shall be identified, specified, and referred to, so as to inform the court what state of facts, charge, affidavit, deposition, examination, or answer were so brought in or used.³⁷

77.

The master shall regulate all the proceedings in every hearing before him, upon every such reference; and he shall have full authority to examine the parties in the cause, upon oath, touching all matters contained in the reference, and also to require the production of all books, papers, writings, vouchers, and other documents applicable thereto; and also to examine on oath, *viva voce*, all witnesses produced by the parties before him, and to order the examination of other witnesses to be taken, under a commission to be issued upon his certificate from the clerk's office or by deposition, according to the act of Congress, or otherwise, as hereinafter provided; and also to direct the mode in which the matters requiring evidence shall be proved before him; and generally to do all other acts, and direct all other inquiries and proceedings in the matters before him, which he may deem necessary and proper to the justice and merits thereof and the rights of the parties.³⁸

³⁶ Compare Nos. 51, 53, and 58, Eng. Ord. in Chan. April 3, 1828, as amended Nov. 23, 1831.

³⁷ Compare Nos. 51, 60, 69, and 73, Eng. Ord. in Chan. April 3, 1828, as amended Nov. 23, 1831.

³⁸ Identical with No. 48, Eng. Ord. in Chan. Aug. 26, 1841.

78.

Witnesses who live within the district may, upon due notice to the opposite party, be summoned to appear before the commissioner appointed to take testimony, or before a master or examiner appointed in any cause, by subpoena in the usual form, which may be issued by the clerk in blank, and filled up by the party praying the same, or by the commissioner, master, or examiner, requiring the attendance of the witnesses at the time and place specified, who shall be allowed for attendance the same compensation as for attendance in court; and if any witness shall refuse to appear or give evidence it shall be deemed a contempt of the court, which being certified to the clerk's office by the commissioner, master, or examiner, an attachment may issue thereupon by the order of the court or of any judge thereof, in the same manner as if the contempt were for not attending, or for refusing to give testimony in the court. But nothing herein contained shall prevent the examination of witnesses *visa voce* when produced in open court, if the court shall, in its discretion, deem it advisable.

79.

All parties accounting before a master shall bring in their respective accounts in the form of debtor and creditor; and any of the other parties who shall not be satisfied with the account so brought in shall be at liberty to examine the accounting party *visa voce*, or upon interrogatories, in the master's office, or by deposition, as the master shall direct.³⁹

80.

All affidavits, depositions, and documents which have been previously made, read, or used in the court upon any proceeding in any cause or matter may be used before the master.⁴⁰

81.

The master shall be at liberty to examine any creditor or other person coming in to claim before him, either upon written interrogatories or *visa voce*, or in both modes, as the nature of the case may appear to him to require. The evidence upon such examinations shall be taken down by the master, or by some other person by his order

³⁹ Identical with No. 61, Eng. Ord. in Chan. April 3, 1828, as amended Nov. 23, 1831.
⁴⁰ Compare No. 65, Eng. Ord. in Chan. April 3, 1828, as amended Nov. 23, 1831.

and in his presence, if either party requires it, in order that the same may be used by the court if necessary.⁴¹

82.

The circuit courts may appoint standing masters in chancery in their respective districts, (a majority of all the judges thereof, including the justice of the Supreme Court, the circuit judges, and the district judge for the district, concurring in the appointment,) and they may also appoint a master *pro hac vice* in any particular case. The compensation to be allowed to every master in chancery for his services in any particular case shall be fixed by the circuit court, in its discretion, having regard to all the circumstances thereof, and the compensation shall be charged upon and borne by such of the parties in the cause as the court shall direct. The master shall not retain his report as security for his compensation; but when the compensation is allowed by the court, he shall be entitled to an attachment for the amount against the party who is ordered to pay the same, if, upon notice thereof, he does not pay it within the time prescribed by the court.⁴²

EXCEPTIONS TO REPORT OF MASTER.

83.

The master, as soon as his report is ready, shall return the same into the clerk's office, and the day of the return shall be entered by the clerk in the order book. The parties shall have one month from the time of filing the report to file exceptions thereto; and, if no exceptions are within that period filed by either party, the report shall stand confirmed on the next rule-day after the month is expired. If exceptions are filed, they shall stand for hearing before the court, if the court is then in session; or, if not, then at the next sitting of the court which shall be held thereafter, by adjournment or otherwise.

84.

And, in order to prevent exceptions to reports from being filed for frivolous causes, or for mere delay, the party whose exceptions are overruled shall, for every exception overruled, pay costs to the other party, and for every exception allowed shall be entitled to costs; the

⁴¹ Identical with No. 72, Eng. Ord. in Chan. April 3, 1828, as amended Nov. 23, 1831. ⁴² For original form of this rule see 1 How. lxviii.

cost to be fixed in each case by the court, by a standing rule of the circuit court.

DECREES.

85.

Clerical mistakes in decrees or decretal orders, or errors arising from any accidental slip or omission, may, at any time before an actual enrollment thereof, be corrected by order of the court or a judge thereof, upon petition, without the form or expense of a rehearing.⁴³

86.

In drawing up decrees and orders, neither the bill, nor answer, nor other pleadings, nor any part thereof, nor the report of any master, nor any other prior proceeding, shall be recited or stated in the decree or order; but the decree and order shall begin, in substance, as follows: "This cause came on to be heard (or to be further heard, as the case may be) at this term, and was argued by counsel; and thereupon, upon consideration thereof, it was ordered, adjudged, and decreed as follows, viz.:" [Here insert the decree or order.]⁴⁴

GUARDIANS AND PROCHEIN AMIS.

87.

Guardians *ad litem* to defend a suit may be appointed by the court, or by any judge thereof, for infants or other persons who are under guardianship, or otherwise incapable to sue for themselves. All infants and other persons so incapable may sue by their guardians, if any, or by their *prochein ami*; subject, however, to such orders as the court may direct for the protection of infants and other persons.

88.

Every petition for a rehearing shall contain the special matter or cause on which such rehearing is applied for, shall be signed by counsel, and the facts therein stated, if not apparent on the record, shall be verified by the oath of the party or by some other person. No hearing shall be granted after the term at which the final decree of

⁴³ Substantially the same as No. 45, ⁴⁴ Compare No. 27, Eng. Ord. in Chan. Eng. Ord. in Chan. April 3, 1828, as Dec. 21, 1833. amended Nov. 23, 1831.

the court shall have been entered and recorded, if an appeal lies to the Supreme Court. But if no appeal lies, the petition may be admitted at any time before the end of the next term of the court, in the discretion of the court.

89.

The circuit courts (a majority of all the judges thereof, including the justice of the Supreme Court, the circuit judges, and the district judge for the district, concurring therein) may make any other and further rules and regulations for the practice, proceedings, and process, mesne and final, in their respective districts, not inconsistent with the rules hereby prescribed, in their discretion, and from time to time alter and amend the same.

90.

In all cases where the rules prescribed by this court or by the circuit court do not apply, the practice of the circuit court shall be regulated by the present practice of the high court of chancery in England, so far as the same may reasonably be applied consistently with the local circumstances and local conveniences of the district where the court is held, not as positive rules, but as furnishing just analogies to regulate the practice.

91.

Whenever, under these rules, an oath is or may be required to be taken, the party may, if conscientiously scrupulous of taking an oath, in lieu thereof make solemn affirmation to the truth of the facts stated by him.

DECEMBER TERM, 1863.

92.

Ordered, That in suits in equity for the foreclosure of mortgages in the circuit courts of the United States, or in any court of the Territories having jurisdiction of the same, a decree may be rendered for any balance that may be found due to the complainant over and above the proceeds of the sale or sales, and execution may issue for the collection of the same, as is provided in the eighth rule of this court regulating the equity practice, where the decree is solely for the payment of money.

OCTOBER TERM, 1878.

INJUNCTIONS.

93.

When an appeal from a final decree, in an equity suit, granting or dissolving an injunction, is allowed by a justice or judge who took part in the decision of the cause, he may, in his discretion, at the time of such allowance, make an order suspending or modifying the injunction during the pendency of the appeal, upon such terms, as to bond or otherwise, as he may consider proper for the security of the rights of the opposite party.⁴⁵

OCTOBER TERM, 1881.

94.

Every bill brought by one or more stockholders in a corporation against the corporation and other parties, founded on rights which may properly be asserted by the corporation, must be verified by oath, and must contain an allegation that the plaintiff was a shareholder at the time of the transaction of which he complains, or that his share had devolved on him since by operation of law, and that the suit is not a collusive one to confer on a court of the United States jurisdiction of a case of which it would not otherwise have cognizance. It must also set forth with particularity the efforts of the plaintiff to secure such action as he desires on the part of the managing directors or trustees, and, if necessary, of the shareholders, and the causes of his failure to obtain such action.

⁴⁵ See No. 47, Eng. Ord. in Chan. April 3, 1828, as amended Nov. 23, 1881.

ORDINANCES OF LORD CHANCELLOR BACON.

1.

No decree shall be reversed, altered, or explained, being once under the great seal, but upon bill of review; and no bill of review shall be admitted, except it contain either error in law, appearing in the body of the decree, without further examination of matters in fact, or some new matter which hath risen in time after the decree, and not any new proof which might have been used when the decree was made. Nevertheless, upon new proof that is come to light after the decree made, and could not possibly have been used at the time when the decree passed, a bill of review may be grounded by the special license of the court, and not otherwise.

2.

In case of miscasting (being a matter demonstrative), a decree may be explained and reconciled by an order without a bill of review; not understanding, by miscasting, any pretended misrating or misvaluing, but only error in the auditing or numbering.

3.

No bill of review shall be admitted, or any other new bill to change matter decreed, except the decree be first obeyed and performed—as, if it be for land, that the possession be yielded; if it be for money, that the money be paid; if it be for evidences, that the evidences be brought in; and so in other cases which stand upon the strength of the decree alone.

4.

But, if any act be decreed to be done which extinguisheth the party's right at the common law, as making of assurance or release, acknowledging satisfaction, canceling of bonds or evidences, and the like, those parts of the decree are to be spared until the bill of review be determined; but such sparing is to be warranted by public order made in court.

5.

No bill of review shall be put in except the party that prefers it enters into recognizance with sureties for satisfying of costs and damages for the delay, if it be found against him.

6.

No decree shall be made upon pretense of equity against the express provision of an act of Parliament. Nevertheless, if the construction of such act of Parliament hath for a time gone away in general opinion and reputation, and after, by a later judgment, hath been controlled, then relief may be given upon matter of equity for cases arising before the said judgment, because the subject was in no default.

7.

Imprisonment for breach of a decree is in nature of an execution, and therefore the custody ought to be strait, and the party not to have any liberty to go abroad but by special license of the lord chancellor; but no close imprisonment is to be but by express order for willful and extraordinary contempts and disobedience as hath been used.

8.

In case of enormous and obstinate disobedience in breach of a decree, an injunction is to be granted *sub poena* of a sum; and upon affidavit or other sufficient proof of persisting in contempts, fines are to be pronounced by the lord chancellor in open court, and the same estreated down into the Hanaper, if cause be, by a special order.

9.

In case of a decree made for the possession of land, a writ of execution goeth forth, and, if that be disobeyed, then process of contempt, according to the course of the court against the person to commission of rebellion, and then a sergeant at arms by special warrant, and, in case the sergeant at arms cannot find him, or be resisted, upon the coming in of the party and his commitment, if he persist in disobedience, an injunction is to be granted for the possession, and, in case that also be disobeyed, then a commission to put him in possession.

10.

Where the party is committed for breach of a decree, he is not to be enlarged until the decree be fully performed in all things which are

to be done presently; but if there be other parts of the decree to be performed at days or times to come, then he may be enlarged by order of court upon recognizance, with sureties, to be put in for the performance *de futuro*; otherwise not.

11.

Where causes come to a hearing in court, no decree bindeth any person who was not served with process *ad audiendum judicium*, according to the course of the court, or did appear *gratis* in person in court.

12.

No decree bindeth any that cometh in *bona fide* by conveyance from the defendant before the bill exhibited, and is made no party, neither by bill nor order; but where he comes in *pendente lite*, and while the suit is in full prosecution, and without any color of allowance or privity of the court, there regularly the decree bindeth; but if there were any intermission of suit, or the court made acquainted with the conveyance, the court is to give order upon the special matter according to justice.

13.

Where causes are dismissed upon full hearing, and the dismissal signed by the lord chancellor, such causes shall not be retained again, nor new bill exhibited, except it be upon new matter, like to the case of the bill of review.

14.

In case of other dismissions which are not upon hearing of the cause, if any new bill be brought, the dismissal is to be pleaded; and after reference and report of the contents of both suits, and consideration taken of the causes of the former dismissal, the court shall rule the retaining or dismissing of the new bill, according to justice and the nature of the case.

15.

All suits grounded upon wills nuncupative, leases parol, or upon long leases that tend to the defeating of the king's tenures, for the establishing of perpetuities, or grounded upon remainders put in to the crown to defeat purchasers, or for brokage or rewards to make

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marriages, or for bargains at play and wagers, or for bargains for offices contrary to the statute of 5 & 6 Edw. VI., or for contracts upon usury or simony, are regularly to be dismissed upon motion if they be the sole effect of the bill, and if there be no special circumstances to move the court to allow them a proceeding, and all suits under the value of ten pounds are regularly to be dismissed.

16.

Dismissions are properly to be prayed and had, either upon hearing or upon plea unto the bill, when the cause comes first into the court; but dismissions are not to be prayed after the parties have been at charges of examination, except it be upon special cause.

17.

If the plaintiff discontinue the prosecution, after all the defendants have answered, above the space of one whole term, the cause is to be dismissed of course, without any motion, but after replication put in no cause is to be dismissed without motion and order of the court.

18.

Double vexation is not to be admitted; but if the party sue for the same cause at common law and in chancery, he is to have a day given to make his election where he will proceed, and, in default of such election, to be dismissed.

19.

Where causes are removed by special *certiorari* upon a bill containing matter of equity, the plaintiff is, upon receipt of his writ, to put in bond to prove his suggestion within fourteen days after the receipt, which, if he does not prove, then, upon certificate from either of the examiners presented to the lord chancellor, the cause shall be dismissed with costs, and a *procedendo* to be granted.

20.

No injunction of any nature shall be granted, revived, dissolved, or stayed upon any private petition.

21.

No injunction to stay suits at the law shall be granted upon priority of suit only, or upon surmise of the plaintiff's bill only, but upon

matter confessed in the defendant's answer or matter of record, or writing plainly appearing, or when the defendant is in contempt for not answering, or that the debt desired to be stayed appeareth to be old, and hath slept long, or the creditor or the debtor hath been dead some good time before the suit brought.

22.

Where the defendant appears not, but sits an attachment; or where he doth appear, and departs without answer, and is under attachment for not answering; or when he takes oath he cannot answer without sight of evidences in the country; or where, after answer, he sues at common law by attorney, and absents himself beyond sea,—in these cases an injunction is to be granted for the stay of all suits at the common law until the party answer or appear in person in court, and the court give further order; but nevertheless, upon answer put in, if there be no motion made the same term, or the next general seal after the term, to continue the injunction, in regard of the insufficiency of the answer put in, or in regard of the matter confessed in the answer, then the injunction to die and dissolve without any special order.

23.

In the case aforesaid, where an injunction is to be granted for stay of suits at the common law, if the like suit be in the chancery, either by *scire facias* or privilege or English bill, then the suit is to be stayed by order of the court, as it is in other courts by injunction, for that the court cannot enjoin itself.

24.

Where an injunction hath been obtained for stay of suits, and no prosecution is had for the space of three terms, the injunction is to fall of itself, without further motion.

25.

Where a bill comes in after an arrest at the common law for a debt, no injunction shall be granted without bringing the principal money into court, except there appear in the defendant's answer, or by sight of writings, plain matter tending to discharge the debt in equity; but if an injunction be awarded and disobeyed, in that case no money shall be brought in or deposited in regard of the contempt.

26.

Injunctions for possession are not to be granted before a decree, but where the possession hath continued by the space of three years before the bill exhibited, and upon the same title, and not upon any title by lease, or otherwise determined.

27.

In case where the defendant sits all the process of contempt and cannot be found by the sergeant at arms, or resists the sergeant, or makes rescue, a sequestration shall be granted of the land in question, and, if the defendant render not himself within the year, then an injunction for the possession.

28.

Injunctions against felling of timber, plowing up of ancient pastures, or for the maintaining of inclosures, or the like, shall be granted according to the circumstances of the case; but not in case where the defendant, upon his answer, claimeth an estate of inheritance, except it be where he claimeth the land in trust, or upon some other special ground.

29.

No sequestration shall be granted but of lands, leases, or goods in question, and not of any other lands or goods not contained in the suits.

30.

Where a decree is made for rent to be paid out of land, or a sum of money to be levied out of the profits of land, there a sequestration of the same lands, being in the defendant's hands, may be granted.

31.

Where the decrees of the provincial counsel, or of the court of requests, or the queen's court, are, by continuancy or other means, interrupted, there the court of chancery, upon a bill preferred for corroborations of the same jurisdictions, decrees, and sentences, shall give remedy.

32.

Where any cause comes to a hearing that hath been formerly decreed in any other of the king's courts of justice at Westminster,

such decree shall be first read, and then to proceed to the rest of the evidence on both sides.

33.

Suits after judgment may be admitted according to the ancient custom of the chancery, and the late royal decision of his majesty of record after solemn and great deliberation; but in such suits it is ordered that bond be put in with good sureties to prove the suggestions of the bill.

34.

Decrees upon suits brought after judgment shall contain no words to make void or weaken the judgment, but shall only correct the corrupt conscience of the party, and rule him to make restitution or perform other acts, according to the equity of the case.

35.

The registers are to be sworn, as hath been lately ordered.

36.

If any order shall be made, and the court not informed of the last material order formerly made, no benefit shall be taken by such order, as granted by abuse and surreptition, and to that end the registers ought duly to mention the former order in the latter.

37.

No order shall be explained upon any private petition, but in court as they are made; and the register is to set down the orders as they were pronounced by the court truly at his peril, without troubling the lord chancellor by any private attending of him to explain his meaning; and if any explanation be desired, it is to be done by public motion, where the other party may be heard.

38.

No draft of any order shall be delivered by the register to either party without keeping a copy by him, to the end that, if the order be not entered, nevertheless the court may be informed what was formerly done, and not put to new trouble and hearing, and to the end, also, that knowledge of orders be not kept back too long from either party, but may presently appear at the office.

39.

Where a cause¹ hath been debated, upon hearing of both parties, and opinion hath been delivered by the court, and, nevertheless, the cause referred to treaty, the registers are not to omit the opinion of the court in drawing of the order of reference, except the court doth specially declare that it be entered without any opinion either way; in which case, nevertheless, the registers are, out of their short note, to draw up some more full remembrance of that that passed in court, to inform the court if the cause come back and cannot be agreed.

40.

The registers, upon sending of their draft unto the counsel of the parties, are not to respect the interlineations or alterations of the said counsel (be the said counsel never so great), further than to put them in remembrance of that which was truly delivered in court, and so to conceive the order upon their oath and duty, without any further respect.

41.

The registers are to be careful in penning and drawing up of decrees, and special matters of difficulty and weight, and therefore, when they present the same to the lord chancellor, they ought to give him understanding which are those decrees of weight, that they may be read and reviewed before his lordship sign them.

42.

The decrees granted at the rolls are to be presented to his lordship, with the orders whereupon they are drawn, within two or three days after every term.

43.

Injunctions for possession, or for stay of suits after verdict, are to be presented to his lordship together with the orders whereupon they go forth, that his lordship may take consideration of the orders before he sign them.

¹ In the text of the Orders the word Chan. 20; it also appears from Tothill, "lease" is inserted instead of "cause" Proceedings of High Court of Chancery as here printed. This typographical error is noted in Beames, Orders in

44.

Where any order upon the special nature of the case shall be made against any of these general rules, there the register shall plainly and expressly set down the particulars, reasons, and grounds moving the court to vary from the general rule.

45.

No reference upon a demurrer or question touching the jurisdiction of the court shall be made to the masters of the chancery, but such demurrers shall be heard and ruled in court, or by the lord chancellor himself.

46.

No order shall be made for the confirming or ratifying of any report without day first given, by the space of a sevensnight at the least, to speak to it in court.

47.

No reference shall be made to any masters of the court, or any other commissioners, to hear and determine, where the cause is gone so far as to examination of witnesses, except it be in special cases of parties near in blood, or of extreme poverty, or by consent, and, generally, reference of the state of the cause, except it be by consent of the parties, to be sparingly granted.

48.

No report shall be respected in court which exceedeth the warrant of reference.

49.

The masters of the court are required not to certify the state of any cause as if they would make breviates of the evidence on both sides, which doth little ease the court, but with some opinion, or otherwise in case they think it too doubtful to give opinion, and therefore make such special certificate, the cause is to go on to a judicial hearing without respect had to the same.

50.

Matters of account, unless it be in very weighty causes, are not fit for the court, but to be prepared by reference, with this difference,

nevertheless: that the cause comes first to a hearing, and, upon the entrance into a hearing, they may receive some direction, and be turned over to have the accounts considered, except both parties, before a hearing, do consent to a reference of the examination of the accounts to make it more ready for a hearing.

51.

The like course to be taken for the examination of court rolls, upon customs and copies, which shall not be referred to any one master, but to two masters, at the least.

52.

No reference to be made of the insufficiency of an answer without showing of some particular point of the defect, and not upon surmise of the insufficiency in general.

53.

Where a trust is confessed by the defendant's answer, there needeth no farther hearing of the cause, but a reference presently to be made of the account, and so to go on to a hearing of the accounts.

54.

In all suits where it shall appear, upon the hearing of the cause, that the plaintiff had not *probabilem causam litigandi*, he shall pay unto the defendant his utmost costs, to be assessed by the court.

55.

If any bill, answer, replication, or rejoinder shall be found of an immoderate length, both the party and the counsel under whose hand it passed shall be fined.

56.

If there be contained in any bill, answer, or other pleadings or interrogatory any matter libelous or slanderous against any that is not party to the suit, or against such as are parties to the suit, upon matters impertinent, or in derogation of the settled authorities of any of his majesty's courts, such bills, answers, pleadings, or interrogatories shall be taken off the file and suppressed, and the parties severally punished by commitment or ignominy, as shall be thought fit for the abuse of the court, and the counselors at law who have set their hands shall likewise receive reproof or punishment, if cause be.

57.

Demurrers and pleas which tend to discharge the suit shall be heard first upon every day of orders, that the subject may know whether he shall need farther attendance or not.

58.

A demurrer is properly upon matter defective contained in the bill itself, and no foreign matter, but a plea is of foreign matter to discharge or stay the suit, as that the cause hath been formerly dismissed, or that the plaintiff is outlawed or excommunicated, or there is another bill depending for the same cause, or the like; and such plea may be put in without oath in case where the matter of the plea appears upon record, but, if it be anything that doth not appear upon record, the plea must be upon oath.

59.

No plea of outlawry shall be allowed without pleading the record *sub pede sigilli*; nor plea of excommunication without the seal of the ordinary.

60.

Where any suit appeareth upon the bill to be of the natures which are regularly to be dismissed, according to the 15th ordinance, such matter is to be set forth by way of demurrer.

61.

Where an answer shall be certified insufficient, the defendant is to pay costs; and if a second answer be returned insufficient in the points before certified insufficient, then double costs; and upon the third, treble costs; and upon the fourth, quadruple costs; and then to be committed also until he hath made a perfect answer, and to be examined upon interrogatories touching the points defective in his answer; but if any answer be certified sufficient, the plaintiff is to pay costs.

62.

No insufficient answer can be taken hold of after replication put in, because it is admitted sufficient by the replication.

63.

An answer to a matter charged, as the defendant's own fact, must be direct, without saying it is to his remembrance, or as he believeth, if it be laid as done within seven years before. If the defendant deny the fact, he must traverse it directly, and not by way of negative pregnant; as, if a fact be laid to be done with diverse circumstances, the defendant may not traverse it literally as it is laid in the bill, but must traverse the point of substance. So, if he be charged with the receipt of £100, he must traverse that he hath not received £100, nor any part thereof, and, if he have received part, he must set forth what part.

64.

If a hearing be prayed upon bill and answer, the answer must be admitted to be true in all points, and a decree ought not to be made but upon hearing the answer read in court.

65.

Where no counsel appears for the defendant at the hearing, and the process appears to have been served, the answer of such defendant is to be read in court.

66.

No new matter is to be contained in any replication, except it be to avoid matter set forth in the defendant's answer.

67.

All copies in chancery shall contain fifteen lines in every sheet thereof, written orderly and unwastefully, unto which shall be subscribed the name of the principal clerk of the office where it is written, or his deputy, for whom he will answer, for which subscription only no fee at all shall be taken.

68.

All commissions for examinations of witnesses shall be *super interr. inclusis* only, and no return of depositions into the court shall be received but such only as shall be either comprised in one roll, subscribed with the name of the commissioners, or else in divers rolls, whereof each one shall be so subscribed.

69.

If both parties join in commissions, and, upon warning given, the defendant bring his commissioners, but produceth no witnesses, nor ministereth interrogatories, but after seek a new commission, the same shall not be granted; but nevertheless, upon some extraordinary excuse of the defendant's default, he may have liberty granted by special order to examine his witnesses in court upon the former interrogatories, giving the plaintiff, or his attorney, notice that he may examine also if he will.

70.

The defendant is not to be examined upon interrogatories, except it be in very special cases, by express order of the court, to sift out some fraud or practice pregnantly appearing to the court, or otherwise, upon offer of the plaintiff, to be concluded by the answer of the defendant, without any liberty to disprove such answer, or to impeach him after of perjury.

71.

Decrees in other courts may be read upon hearing, without the warrant of any special order, but no depositions taken in any other court are to be read but by special order; and, regularly, the court granteth no order for reading of deposition, except it be between the same parties, and upon the same title and cause of suit.

72.

No examination is to be had of the credit of any witness but by special order, which is sparingly to be granted.

73.

Witnesses shall not be examined *in perpetuam rei memoriam*, except it be upon the ground of a bill first put in, and answer thereunto made, and the defendant or his attorney made acquainted with the names of the witnesses that the plaintiff would have examined, and so publication to be of such witnesses, with this restraint nevertheless: that no benefit shall be taken of the depositions of such witnesses in case they may be brought *viva voce* upon the trial, but only to be used in case of death before the trial, or age, or impotency, or absence out of the realm at the trial.

74.

No witnesses shall be examined after publication, except it be by consent or by special order *ad informandum conscientiam judicis*, and then to be brought close sealed up to the court, to peruse or publish as the court shall think good.

75.

No affidavit shall be taken or admitted by any master of the chancery tending to the proof or disproof of the title or matter in question, or touching the merits of the cause; neither shall any such matters be colorably inserted in any affidavit for serving of process.

76.

No affidavit shall be taken against affidavit, as far as the masters of the chancery can have knowledge, and, if any such be taken, the latter affidavit shall not be used nor read in court.

77.

In case of contempts granted upon force, or ill words upon serving of process, or upon words of scandal of the court, proved by affidavit, the party is forthwith to stand committed. But for other contempts against the orders or decrees of the court, an attachment goes forth first upon affidavit made, and then the party is to be examined upon interrogatories, and his examination referred. And if, upon his examination, he confess matter of contempt, he is to be committed; if not, the adverse party may examine witnesses to prove the contempt. And therefore, if the contempt appear, the party is to be committed; but, if not, or if the party that pursues the contempt do fail in putting in interrogatories, or other prosecution, or fail in the proof of the contempt, then the party charged with the contempt is to be discharged with good costs.

78.

They that are in contempt, especially so far as proclamation of rebellion, are not to be here, neither in that suit nor any other, except the court of special grace suspend the contempt.

79.

Imprisonment upon contempt for matters passed may be discharged of grace after sufficient punishment, or otherwise dispensed with; but

if the imprisonment be for not performance of any order of the court in force, they ought not to be discharged, except they first obey, but the contempt may be suspended for a time.

80.

Injunctions, sequestrations, dismissions, retainers upon dismissions, or final orders are not to be granted upon petitions.

81.

No former order made in court is to be altered, crossed, or explained upon any petition; but such orders may be stayed upon petition for a small stay, until the matter may be moved in court.

82.

No commission for examination of witnesses shall be discharged, nor no examinations or depositions shall be suppressed upon petition, except it be upon point of course of the court first referred to the clerks, and certificate thereupon.

83.

No demurrer shall be overruled upon petition.

84.

No *scire facias* shall be awarded upon recognizances not enrolled, nor upon recognizances enrolled unless it be upon examination of the record with the writ; nor no recognizance shall be enrolled after the year, except it be upon special order from the lord chancellor.

85.

No writ of *ne exeat regnum*, prohibition, consultation, statute of Northampton, *certiorari* special, or *procedendo* special, or *certiorari* or *procedendo* general, more than one in the same cause; *habeas corpus*, or *corpus cum causa*, *vi laica removend*,—restitution thereupon, *de coronatore et viridario eligendo* in case of a moving *de homine repleg. assiz.*, or special patent, *inde ballivo amovend*, *certiorari super presentationibus fact*, *coram commissariis seward*, or *ad quod dampnum*, shall pass without warrant under the lord chancellor's hand, and signed by him, save such writs as (of) *ad quod dampnum* as shall be signed by master attorney.

86.

Writs of privilege are to be reduced to a better rule, both for the number of persons that shall be privileged, and for the case of the privilege; and as for the number, it shall be set down by schedule, for the case is to be understood that, besides parties privileged, as attendants upon the court, suitors and witnesses are only to have privilege *eundo, redeundo, et morando*, for their necessary attendance, and not otherwise, and that such writ of privilege dischargeth only an arrest upon the first process; but yet where, at such times of necessary attendance, the party is taken in execution, it is a contempt to the court, and accordingly to be punished.

87.

No *supplicavit* for the good behavior shall be granted but upon articles grounded upon the oath of two, at the least, or certificate of any one justice of assize, or two justices of the peace, with affidavit that it is their hands, or by order of the star chamber or chancery or other of the king's courts.

88.

No recognizance of the good behavior and the peace taken in the country, and certified into the petty bag, shall be filed in the year, without warrant from the lord chancellor.

89.

Writs of *ne exeat regnum* are properly to be granted, according to the suggestion of the writ, in respect of attempts prejudicial to the king and state, in which case the lord chancellor will grant them, upon prayer of any of the principal secretaries, without cause showing, or upon such information as his lordship shall think of weight; but otherwise, also, they may be granted, according to the practice of long time used, in case of interlopers in trade, great bankrupts, in whose estate many subjects are interested, or other cases that concern multitudes of the king's subjects, also in case of duels and divers others.

90.

All writs, certificates, and whatsoever other process *ret. coram rege in Canc.* shall be brought into the chapel of the rolls within convenient time after the return thereof, and shall be there filed, upon their proper files and bundles, as they ought to be, except the deposi-

tions of witnesses, which may remain with any of the six clerks by the space of one year next after the cause shall be determined by decree, or otherwise be dismissed.

91.

'All injunctions shall be enrolled, or the transcript filed, to the end that, if occasion be, the court may take order to award writs of *scire facias* thereupon, as in ancient time hath been used.

92.

All days given by the court to sheriffs to return their writs, or bring their prisoners upon writs of privilege, or otherwise, between party and party, shall be filed either in the register's office or in the petty bag, respectively; and all recognizances taken to the king's use, or unto the court, shall be duly enrolled in convenient time with the clerks of the enrollment, and calendars made of them, and the calendars every Michaelmas term to be presented to the lord chancellor.

93.

In case of suits upon the commissions for charitable uses, to avoid charge, there shall need no bill, but only exceptions to the decree and answer forthwith to be made thereunto; and thereupon, and upon sight of the inquisition, and the decree brought unto the lord chancellor by the clerk of the petty bag, his lordship, upon perusal thereof, will give order under his hand for an absolute decree to be drawn up.

94.

Upon suit for the commission of sewers, the names of those that are desired to be commissioners are to be preferred to the lord chancellor in writing; then his lordship will send the names of some privy counselor, lieutenant of the shire, justices of assize, being resident in the parts for which the commission is prayed, to consider of them, that they be not put in for private respects, and, upon the return of such opinion, his lordship will farther order for the commission to pass.

95.

No new commission of sewers shall be granted while the first is in force, except it be upon discovery of abuse or fault in the first commissioners, or otherwise upon some great and weighty ground.

96.

No petition of bankrupts shall be granted but upon petition first exhibited to the lord chancellor, together with names presented, of which his lordship will take consideration, and always single some learned in the law with the rest, yet so as care be taken that the same parties be not too often used in commissions; and likewise care is to be taken that bond with good surety be entered into, in two hundred pounds at least, to prove him a bankrupt.

97.

No commission of delegates in any case of weight shall be awarded but upon petition preferred to the lord chancellor, who will name the commissioners himself, to the end that they may be persons of convenient quality, having regard to the weight of the cause, and the dignity of the court from whom the appeal is.

98.

Any man shall be admitted to defend *in forma pauperis* upon oath; but for plaintiffs, they are ordinarily to be referred to the court of requests, or to the provincial counsels, if the case arise in the jurisdictions, or to some gentlemen in the country, except it be in some special cases of commiseration or potency of the adverse party.

99.

Licenses to collect for losses by fire or water are not to be granted but upon good certificate, and not for decays of suretyship, or debt, or any other casualties whatsoever; and they are rarely to be renewed; and they are to be directed unto the county where the loss did arise, if it were by fire, and the counties that abut upon it, as the case shall require, and, if it were by sea, then unto the county where the port is from whence the ship went, and to some counties adjoining.

100.

No exemplification shall be made of letters patent (*inter alia*) with omission of the general words; nor of records made void or canceled; nor of the decrees of this court not enrolled; nor of depositions by parcel; nor of depositions in court, to which the hand of the examiner is not subscribed; nor of records of the court, not being enrolled or filed; nor of records of any other courts, before the same be duly certified to this court, and orderly filed here; nor of any

records upon the sight and examination of any copy in paper but upon sight and examination of the original.

101.

And, because time and experience may discover some of these rules to be inconvenient, and some other to be fit to be added, therefore his lordship intendeth, in any such case, from time to time to publish any such revocations or additions.

The foregoing ordinances are taken from Beames, Orders in Chancery, 1-46, and are here reprinted from Fletcher's Equity Pleading and Practice, pp. 1045-1061. The ordinances as set forth in other works differ slightly in phraseology.

Eq. Prac. Vol. III.—108.

ENGLISH ORDERS IN CHANCERY.

ORDERS OF APRIL 3, 1828, AS AMENDED NOVEMBER 23, 1831.¹

1.

That every plaintiff, as well in a country cause as in a town cause, shall be at liberty, without affidavit, to obtain an order for a subpoena returnable immediately; but such subpoena in a country cause is to be without prejudice to the defendant's right to eight days' time to enter his appearance after he has been served with the subpoena.

2.

That a writ of subpoena to appear, or to appear and answer, shall be sued out for each defendant, except in the case of husband and wife defendants; and that the costs of all such writs shall be costs in the cause.

3.

That a defendant in a country cause shall no longer be permitted to crave the common *dedimus*; but shall either put in his answer within eight days after his appearance, or shall obtain the usual orders for time.

4.

That in all cases, whether the defendant's answer be filed in term time or in vacation, the plaintiff shall be allowed two months to deliver exceptions to such answer; but if the exceptions be not delivered within the two months, the answer shall thenceforth be deemed sufficient, and the plaintiff shall have no order to deliver exceptions *nunc pro tunc*.

5.

That when exceptions taken to an answer for insufficiency are not submitted to, the plaintiff may, at the expiration of eight days after the exceptions are delivered, but not before, unless in injunction

¹ See 2 Smith Ch. Pr. (2d ed.) 443-462; 2 Bates Fed. Eq. Proc. 1129-1147.

causes, refer such answer for insufficiency; and if he do not refer the same within the next six days, he shall be considered as having abandoned the exceptions; in which latter case such answer shall thenceforth be deemed sufficient.

6.

That if the plaintiff do not, within three weeks after a defendant's second or third answer is filed, refer the same for insufficiency on the old exceptions, such answer shall thenceforth be deemed sufficient.

7.

That if the plaintiff do refer a defendant's second or third answer for insufficiency on the old exceptions, then the particular exception or exceptions to which he requires a further answer shall be stated in the order.

8.

That if upon a reference of exceptions, the master shall find the answer insufficient, he shall fix the time to be allowed for putting in a further answer, and shall specify the same in his report, from the date whereof such time shall run, and it shall not be necessary for the plaintiff to serve a subpoena for the defendant to make a better answer: And any defendant who shall not put in a further answer within the time so allowed, shall be in contempt, and be dealt with accordingly.

9.

That if upon a reference of exceptions the answer be certified sufficient, it shall be deemed to be so from the date of the master's report; and if the defendant submit to answer without a report from the master, the answer shall be deemed insufficient from the date of the submission.

10.

That upon a third answer being reported insufficient, the defendant shall be examined upon interrogatories to the points reported insufficient, and shall stand committed until such defendant shall have perfectly answered such interrogatories; and shall pay, in addition to the four pounds costs heretofore paid, such further costs as the court shall think fit to award.

11.

That no order shall be made for referring any pleading or other matter depending before the court for scandal or impertinence, unless exceptions are taken in writing and signed by counsel, describing the particular passages which are considered to be scandalous or impertinent, nor unless such order be obtained within six days after the delivery of such exceptions.

12.

That when any order is made for referring an answer for insufficiency, or for referring an answer or other pleading or matter depending before the court for scandal or impertinence, the order shall be considered as abandoned, unless the party obtaining the order shall procure the master's report within a fortnight from the date of such order, or unless the master shall within the fortnight certify that a further time, to be stated in his certificate, is necessary, in order to enable him to make a satisfactory report; in which case the order shall be considered as abandoned if the report be not obtained within the further time so stated; and where such order relates to alleged insufficiency in an answer, such answer shall be deemed sufficient from the time when the order is to be considered as abandoned.

13.

That after an answer has been filed, the plaintiff shall be at liberty, before filing a replication, to obtain upon motion or petition without notice, one order for leave to amend the bill; but no further leave to amend shall be granted after an answer, and before replication, unless the court shall be satisfied by affidavit that the draft of the intended amendments has been settled, approved, and signed by counsel, and that such amendments are not intended to be made for the purpose of delay or vexation, but because the same are considered to be material to the case of the plaintiff; such affidavit to be made by the plaintiff, or one of the plaintiffs, where there is more than one, and his, her, or their solicitor, or by such solicitor alone, in case the plaintiff or plaintiffs, from being abroad or otherwise, shall be unable to join therein; but no order to amend shall be made after answer and before replication, either without notice or upon affidavit in manner hereinbefore mentioned, unless such order be obtained within six weeks after the answer, if there be only one defendant, or after the last of the answers if there be two or more defendants, is to be deemed sufficient. But this order shall not extend to amendments which are made only for

the purpose of rectifying some clerical error, or error in names, dates, or sums; in which cases the order to amend may be obtained upon motion or petition, without notice.

14.

That every order for leave to amend the bill shall contain an undertaking by the plaintiff to amend the bill within three weeks from the date of the order; and in default thereof such order shall become void, and the cause shall, as far as relates to any motion to dismiss the bill for want of prosecution, stand in the same situation as if such order had not been made.

15.

That after a replication has been filed the plaintiff shall not be permitted to withdraw it and to amend the bill without a special order of the court for that purpose, made upon a motion, of which notice has been given; the court being satisfied by affidavit that the matter of the proposed amendment is material and could not, with reasonable diligence, have been sooner introduced into the bill.

16.

That where the answer of a defendant is to be deemed sufficient, whether it be in term time or in vacation, if the plaintiff or plaintiffs shall not proceed in the cause, the defendant shall be at liberty, after the expiration of two months, to move, upon notice, that the bill be dismissed with costs, for want of prosecution; and the bill shall accordingly be dismissed with costs, unless the plaintiff or plaintiffs shall appear upon such motion, and give an undertaking to file a replication, and serve a subpoena to rejoin; and in case he requires a commission to examine witnesses, shall obtain and serve an order for such commission, within three weeks from the date of such undertaking; or unless the plaintiff or plaintiffs, without filing a replication, shall appear upon such motion, and give an undertaking to hear the cause as against the defendant making the motion, upon bill and answer; or unless it shall appear that the plaintiff or plaintiffs is or are unable to proceed in the cause, by reason of any other defendant or defendants not having sufficiently answered the bill, and that due diligence has been used to obtain a sufficient answer or answers from such other defendant or defendants; in which case the court shall allow to the plaintiff or plaintiffs such further time for proceeding in the cause as shall appear to the court to be reasonable. And in case

the plaintiff or plaintiffs do appear upon the motion to dismiss, and give the undertaking to file a replication, and take the other proceedings consequent thereon, hereinbefore required, then all the rules and regulations, with respect to the commission and the return thereof, and the setting down the cause for hearing, and the rights of the defendant with respect to the commission, in case of any default on the part of the plaintiff, which are particularly expressed in the next order, shall apply to all cases under this order.

17.

That where the plaintiff files a replication, without having been served with a notice of motion to dismiss the bill for want of prosecution, he shall serve the subpoena to rejoin; and in case he requires a commission to examine witnesses, shall obtain and serve an order for such commission, within three weeks from the filing of the replication, and such commission shall, at the latest, be returnable on the first return of the second term then next following; and the plaintiff shall give his rules to produce witnesses, and pass publication at the latest in the same term, and shall set down his cause for hearing, and duly serve the subpoena to hear judgment returnable in the succeeding term; and if the plaintiff shall make default herein, then upon application by the defendant, upon notice of motion, the plaintiff's bill shall stand dismissed out of court with costs, unless the court shall make special order to the contrary. And in case the plaintiff serves a subpoena to rejoin, within three weeks after filing the replication, but does not obtain and serve an order for a commission to examine witnesses within that time, then the defendant shall be at liberty, without notice, to obtain an order for a commission to examine witnesses, returnable at the like period as the plaintiff is entitled to, pursuant to this order, and shall have the carriage of such commission. And if the plaintiff obtains an order for, and sues out a commission, and neglects to execute and return the same, at or within the time stated in this order, the defendant shall be entitled to an order as before stated, for a commission returnable on the last return of the term following that which is allowed to the plaintiff by this order, for the return of his commission. And when any commission issues pursuant to this order, or the last foregoing order, the parties shall have liberty to execute the same in term time, and publication shall stand enlarged until the commission shall be returnable; and the plaintiff shall be at liberty to set down the cause, in the meantime, without the necessity of inserting such directions in the order for the commission.

18.

That publication shall not be enlarged except upon special application to the court, made upon notice supported by affidavit, and at the cost of the party applying, unless otherwise ordered by the court.

19.

That the time which occurs between the last seal after Trinity term, and the first seal before Michaelmas term, and between the last seal after Michaelmas term, and the first seal before Hilary term, shall not be reckoned in the computation of time which is allowed to a party for amending any bill, for filing, delivering, or referring exceptions to any answer, or for obtaining a master's report, upon any exceptions.

20.

That service on the clerk in court, of any subpoena to rejoin, or to answer an amended bill, or to hear judgment, shall be deemed good service.

21.

That the order *nisi* for confirming a report may be obtained upon petition as well as by motion, and that service thereof upon the clerk in court of any party shall be deemed good service upon such party.

22.

That every notice of motion, and every petition, notice of which is necessary, shall be served at least two clear days before the hearing of such motion or petition.

23.

That the order *nisi* for dissolving the common injunction may be obtained upon petition as well as by motion, and that every such order be served two clear days at least before the day upon which cause is to be shown against dissolving the injunction.

24.

That when a defendant, in contempt for want of answer, obtains, upon filing his answer, the common order to be discharged as to his contempt, on payment or tender of the costs thereof, or the plaintiff accepts the costs without order, he shall not by such acceptance be

compelled, in the event of the answer being insufficient, to recommence the process of contempt against the defendant, but shall be at liberty to take up the process at the point to which he had before proceeded.

25.

That no witness to be examined before either of the examiners for any party in a cause be in future produced at the seat of the clerk in court for the opposite party; but that a notice in writing containing the name and description of the witness be served there as heretofore.

26.

That the examiner who shall take the examination in chief of any witness shall be at liberty to take his cross-examination also.

27.

That where the same solicitor is employed for two or more defendants, and separate answers shall have been filed, or other proceedings had, by or for two or more defendants separately, the master shall consider, in the taxation of such solicitor's bill of costs, either between party and party, or between solicitor and client, whether such separate answers or other proceedings were necessary or proper; and if he is of opinion that any part of the costs occasioned thereby has been unnecessarily or improperly incurred, the same shall be disallowed.

28.

That where a plaintiff obtains a decree with costs, there the costs occasioned to the plaintiff by the insufficiency of the answer of any defendant shall be deemed to be part of the plaintiff's costs in the cause, such sum or sums being deducted therefrom as were paid by the defendant, according to the course of the court, upon the exceptions to the said answer being submitted to or allowed.

29.

That where the plaintiff is directed to pay to the defendant the costs of the suit, there the costs occasioned to a defendant by any amendment of the bill shall be deemed to be part of such defendant's costs in the cause (except as to any amendment which may have been made by special leave of the court, or which shall appear to have been rendered necessary by the default of such defendant); but

there shall be deducted from such costs any sum or sums which may have been paid by the plaintiff, according to the course of the court, at the time of any amendment.

30.

That when upon taxation a plaintiff who has obtained a decree with costs is not allowed the costs of any amendment of the bill, upon the ground of its having been unnecessarily made, the defendant's costs, occasioned by such amendment, shall be taxed, and the amount thereof deducted from the costs to be paid by the defendant to the plaintiff.

31.

That upon the allowance of any plea or demurrer, the plaintiff or plaintiffs shall pay to the defendant or defendants the taxed costs thereof; and when such plea or demurrer is to the whole bill, then the further taxed costs of the suit also; unless in the case of a plea the plaintiff or plaintiffs shall undertake to reply thereto, and then the costs shall be reserved, or unless the court shall think fit to make other order to the contrary.

32.

That upon the overruling of any plea or demurrer, the defendant or defendants shall pay to the plaintiff or plaintiffs the taxed costs occasioned thereby, unless the court shall make other order to the contrary.

33.

That when two counsel appear for the same party or parties upon the hearing of any cause or matter, and it shall appear to the master to have been necessary or proper for such party or parties to retain two counsel to appear, the costs occasioned thereby shall be allowed, although both of such counsel may have been selected from the outer bar.

34.

That when a cause which stands for hearing is called on to be heard, but cannot be decided by reason of want of parties or other defect on the part of the plaintiff, and is therefore struck out of the paper, if the same cause is again set down, the defendant or defendants shall be allowed the taxed costs occasioned by the first setting down, although he or they do not obtain the costs of the suit.

35.

That where a cause being in the paper for hearing is ordered to be adjourned upon payment of the costs of the day, there the party to pay the same, whether before the lord high chancellor, the master of the rolls, or the vice-chancellor, shall pay the sum of ten pounds, unless the court shall make other order to the contrary.

36.

That whenever upon the hearing of any cause or other matter it shall appear that the same cannot conveniently proceed, by reason of the solicitor for any party having neglected to attend personally, or by some proper person on his behalf, or having omitted to deliver any paper necessary for the use of the court, and which according to its practice ought to have been delivered, such solicitor shall personally pay to all or any of the parties such costs as the court shall think fit to award.

37.

That the sworn clerks of the court and the waiting clerks shall not be entitled to receive any fees for attendance in court, except in cases where they shall actually attend, and where their attendance shall be necessary.

38.

That where any cause which is set down to be heard, either in the court of the lord chancellor, or in the court of the master of the rolls, shall be afterwards set down to be heard in the other of the said two courts, there the solicitor for the plaintiff shall certify the fact to the registrar of the court where the cause was first set down, who shall cause an entry thereof to be made in his book of causes, opposite to the name of such cause; and the solicitor for the plaintiff shall be allowed a fee of six shillings and eight pence for so certifying the fact, if he shall certify the same within eight days after the said cause is so set down a second time.

39.

That where any cause shall become abated, or shall be compromised after the same is set down to be heard in either of the said two courts, the solicitor for the plaintiff shall also certify the fact, as the case may be, to the registrar of the court where the cause is so set down, who shall in like manner cause an entry thereof to be made in his

cause-book, and the solicitor for the plaintiff shall be allowed the same fee of six shillings and eight pence for such certificate, if he shall certify the fact as soon as the same shall come to his knowledge.

40.

That the penal sum in the bond to be given as a security to answer costs by any plaintiff who is out of the jurisdiction of the court, be increased from forty pounds to one hundred pounds.

41.

That the deposit upon exceptions to a master's report shall be increased to ten pounds, to be paid to the adverse party, if the exceptions are overruled; in which case the exceptant shall also pay the further taxed costs occasioned by such exceptions, unless the court shall otherwise order; but in case the exceptant shall in part succeed, the deposit shall be dealt with and costs shall be paid as the court shall direct.

42.

That the deposit upon every petition of appeal or rehearing be increased to twenty pounds, to be paid to the adverse party when the decree or order appealed from is not varied in any material point, together with the further taxed costs occasioned by the appeal or rehearing, unless the court shall otherwise order.

43.

That for the purpose of enabling all persons to obtain precise information as to the state of any cause, and to take the means of preventing improper delay in the progress thereof, any clerk in court shall at the request of any person, whether a party or not in the suit or matter inquired after, procure and furnish a certificate from the six clerks' office, specifying therein the dates and general description of the several proceedings which have been taken in any cause in the said office, whether such clerk in court be or be not concerned as clerk in court in the cause; and that he shall be entitled to receive the sum of three shillings and four pence for such certificate, and no more.

44.

That whenever a person who is not a party appears in any proceeding, either before the court or before the master, service upon the

solicitor in London, by whom such party appears, whether such solicitor act as principal or agent, shall be deemed good service, except in matters of contempt requiring personal service.

45.

That clerical mistakes in decrees or decretal orders, or errors arising from any accidental slip or omission, may at any time before enrolment be corrected upon petition, without the form and expense of a rehearing.

46.

That every application to stay proceedings upon any decree or order which is appealed from, be made first to the judge who pronounced the decree or order.

47.

That every application for a new trial of any issue at law, directed by a judge of this court, be first made to the judge who directed such issue.

48.

That where any decree or order referring any matter to a master is not brought into the master's office within two months after the same decree or order is pronounced, there any party to the cause, or any other party interested in the matter of the reference, shall be at liberty to apply to the court by motion or petition, as he may be advised, for the purpose of expediting the prosecution of the said decree or order.

49.

That every master shall enter in a book to be kept by him for that purpose, the name or title of every cause or matter referred to him, and the time when the decree or order is brought into his office, and the date and description of every subsequent step taken before him in the same cause or matter, and the attendance or non-attendance of the several parties on each of such steps, so that such book may exhibit at one view the whole course of proceedings which is had before him in each particular cause and matter.

50.

That upon the bringing in of every decree or order, the solicitor bringing in the same shall take out a warrant, appointing a time which is to be settled by the master, for the purpose of the master taking into consideration the matter of the said decree or order, and shall serve the same upon the clerks in court of the respective parties, or upon the parties or their solicitors in cases where they shall have no clerks in court.

51.

That at the time so appointed for considering the matter of the said decree or order, the master shall proceed to regulate as far as may be the manner of its execution; as for example, to state what parties are entitled to attend future proceedings, to direct the necessary advertisements, and to point out which of the several proceedings may be properly going on, *pari passu*, and as to what particular matters interrogatories for the examination of the parties appear to be necessary, and whether the matters requiring evidence shall be proved by affidavit or by examination of witnesses; and in the latter case, if necessary, to issue his certificate for a commission; and if the master shall think it expedient so to do, he shall then fix a certain time or certain times within which the parties are to take any certain proceeding or proceedings before him.

52.

That upon any subsequent attendance before him in the same cause or matter, the master, if he thinks it expedient so to do, shall fix a certain time or certain times within which the parties are to take any other proceeding or proceedings before him.

53.

That where some or one, but not all, the parties do attend the master at an appointed time, whether the same is fixed by the master personally or upon a warrant, there the master shall be at liberty to proceed *ex parte* if he think it expedient, considering the nature of the case, so to do.

54.

That where the master has proceeded *ex parte*, such proceeding shall not in any manner be reviewed in the master's office, unless the master, upon a special application made to him for that purpose by a party who was absent, shall be satisfied that he was not guilty of

wilful delay or negligence, and then only upon payment of all costs occasioned by his non-attendance; such costs to be certified by the master at the time, and paid by the party or his solicitor before he shall be permitted to proceed on the warrant to review.

55.

That where a proceeding fails, by reason of the non-attendance of any party or parties, and the master does not think it expedient to proceed *ex parte*, there the master shall be at liberty to certify what amount of costs, if any, he thinks it reasonable to be paid to the party or parties attending, by the absent party or parties, or by his or their solicitor or solicitors, or clerk or clerks in court personally, as the master in his discretion shall think fit; and upon motion or petition, without notice, the court will make order for the payment of such costs accordingly.

56.

That where the party actually prosecuting a decree or order does not proceed before the master with due diligence, there the master shall be at liberty, upon the application of any other party interested, either as a party to the suit, or as one who has come in and established his claim before the master under the decree or order, to commit to him the prosecution of the said decree or order; and from thenceforth, neither the party making default, nor his solicitor, shall be at liberty to attend the master as the prosecutor of the said decree or order.

57.

That upon any application made by any person to the court, the master, if required by the person making the application, shall, in as short a manner as he conveniently can, certify to the court the several proceedings which shall have been had in his office in the same cause or matter, and the dates thereof.

58.

That every master shall be at liberty, without order, to proceed in all matters *de die in diem* at his discretion.

59.

That every warrant for attendance before the master shall be considered as peremptory, and the master shall be at liberty to continue

the attendance beyond the hour and during such time as he thinks proper, and shall be empowered to increase the fee for the solicitor's attendance in proportion to the time actually occupied; and in case the master shall not be attended by the solicitor, or a competent person on behalf of the solicitor of any party, the master shall in such case disallow the usual fee for the solicitor's attendance, taking care in either allowing an increased fee, or disallowing the usual fee, to mark his determination in his attendance-book, and also on the warrant for attendance.

60.

That where by any decree or order of the court, books, papers, or writings are directed to be produced before the master for the purposes of such decree or order, it shall be in the discretion of the master to determine what books, papers, or writings are to be produced, and when and for how long they are to be left in his office; or in case he shall not deem it necessary that such books, papers, or writings should be left or deposited in his office, then he may give directions for the inspection thereof by the parties requiring the same, at such time and in such manner as he shall deem expedient.

61.

That all parties accounting before the master shall bring in their accounts in the form of debtor and creditor; and any of the other parties who shall not be satisfied with the accounts so brought in, shall be at liberty to examine the accounting party upon interrogatories, as the master shall direct.

62.

That all such accounts when passed and settled by the master shall be entered in a book to be kept for that purpose in the master's office, as is now the practice with respect to receivers' accounts; and with proper indexes, in order to be referred to as occasion may require.

63.

That the master, in acting upon the order of the court of 28d April, 1796, shall be at liberty upon the appointment of a receiver, or at any time subsequent thereto, in the place of annual periods for the delivery of the receiver's accounts and payment of his balances, to fix either longer or shorter periods at his discretion; and when

such other periods are fixed by the master, the regulations and principles of the said order shall in all other respects be applied to the said receiver.

64.

That in every order directing the appointment of a receiver of a landed estate, there be inserted a direction that such receiver shall manage, as well as set and let, with the approbation of the master; and that in acting under such an order it shall not be necessary that a petition be presented to the court in the first instance, but the master without special order shall receive any proposal for the management or letting of the estate from the parties interested, and shall make his report thereon, which report shall be submitted to the court for confirmation in the same manner as is now done with respect to reports on such matters made upon special reference; and until such report be confirmed, it shall not give any authority to the receiver.

65.

That all affidavits which have been previously made and read in court, upon any proceeding in a cause or matter, may be used before the master.

66.

That where upon an inquiry before the master affidavits are received, there no affidavit in reply shall be read, except as to new matter, which may be stated in the affidavits in answer; nor shall any further affidavits be read unless specially required by the master.

67.

That the master shall not receive further evidence as to any matter depending before him after issuing the warrant on preparing his report; but that he shall not issue such warrant without previously requiring the parties to show cause why such warrant should not issue.

68.

That no warrant to review any proceeding in the master's office shall be allowed to be taken out, except by permission of the master, upon special grounds to be shown to him for that purpose; and the costs of such review when allowed shall be in the discretion of the master, and shall be paid by and to such persons and at such time as he shall direct,

69.

That the master shall have power at his discretion to examine any witness *viva voce*; and in such case the subpoena for the attendance of the witness shall, upon a note from the master, be issued from the subpoena office; and that the evidence upon such *viva voce* examination shall be taken down by the master, or by the master's clerk in his presence, and preserved in the master's office, in order that the same may be used by the court if necessary.

70.

That in all matters referred to him, the master shall be at liberty, upon the application of any party interested, to make a separate report or reports from time to time as to him shall seem expedient; the costs of such separate reports to be in the discretion of the court.

71.

That where a master shall make a separate report of debts or legacies, there the master shall be at liberty to make such certificate as he thinks fit with respect to the state of the assets, and every person interested shall thereupon be at liberty to apply to the court as he shall be advised.

72.

That the master shall be at liberty to examine any creditor or other person coming in to claim before him, either upon written interrogatories or *viva voce*, or in both modes, as the nature of the case may appear to him to require; the evidence upon such examination being taken down at the time by the master, or by the master's clerk in his presence, and preserved, in order that the same may be used by the court if necessary.

73.

That if any party wishes to complain of any matter introduced into any state of facts, affidavit, or other proceeding before the master, on the ground that it is scandalous or impertinent, or that any examination taken in the master's office is insufficient, he shall be at liberty, without any order or reference by the court, to take out a warrant for the master to examine such matter, and the master shall have authority to expunge any such matter which he shall find to be scandalous or impertinent.

74.

That the master, in deciding on the sufficiency or insufficiency of any answer or examination, shall take into consideration the relevancy or materiality of the statement or question referred to.

75.

That in cases where estates or other property are directed to be sold before the master, the master shall be at liberty, if he shall think it for the benefit of the parties interested, to order the same to be sold in the country, at such place and by such person as he shall think fit.

76.

That where a master is directed to settle a conveyance, or to tax costs in case the parties differ about the same, then the party claiming the costs, or entitled to prepare the conveyance, shall bring the bill of costs, or the draft of the conveyance, into the master's office, and give notice of his having so done to the other party; and at any time within eight days after such notice, such other party shall have liberty to inspect the same without fee, and may take a copy thereof if he thinks fit; and at or before the expiration of the eight days, or such further time as the master shall in his discretion allow, he shall then either agree to pay the costs or adopt the conveyance, as the case may be, or signify his dissent therefrom, and shall thereupon be at liberty to tender a sum of money for the costs, or to deliver a statement in writing of the alterations which he proposes in the draft of the conveyance. But if he make no such tender, nor deliver any such statement in writing, or if the other party refuses to accept the sum so tendered, or to adopt the proposed alterations in the draft of the conveyance, the master shall then proceed to tax the costs, or settle the conveyance, according to the practice of the court. And in case the taxed costs shall not exceed the sum tendered, or the master shall adopt the proposed alterations in the draft of the conveyance, then the costs of the taxation, or the costs of the proceeding with respect to the conveyance, shall be borne by the other party.

77.

That whenever in any proceeding before a master the same solicitor is employed for two or more parties, such master may at his discretion require that any of the said parties shall be represented before him by a distinct solicitor, and may refuse to proceed until such party is so represented.

78.

That such of the foregoing orders as limit or allow any specified time for any party to take any proceeding, or for any other purpose, shall only apply to cases where the period from which such specified time is to be computed shall be on or subsequent to the first day of Easter term next ensuing.

79.

That such of the foregoing orders as relate to the manner in which the costs of any suit or proceeding are to be taxed, and to the amount of costs to be paid on any occasion, shall not apply to any costs which have been incurred, or to the costs of any proceeding which shall have been had or taken previously to the first day of Easter term next ensuing.

80.

That such of the foregoing orders as relate to the course of proceeding in the offices of the masters of the court, or to the authority of the masters, shall have effect from and after the first day of Easter term next ensuing, and shall be acted upon by the masters in all cases, except where from the then advanced stage of any proceeding they are not practically applicable.

81.

That, subject to the regulations hereinbefore specified, the foregoing orders shall take effect as to all suits whether now depending or hereafter commenced, on the first day of Easter term next.

82.

And, whereas the present practice, that causes can only be entered for hearing during the time of term, and that the subpoena *ad audiendum judicium* can only be then returnable, is productive of great delay and inconvenience: It is hereby further ordered by the said lord high chancellor, with the advice and assistance aforesaid, that from henceforth causes may be set down for hearing, and the subpoenas *ad audiendum judicium* served and returnable on any day as well out of term as in term, and this order is to be called the LXXXII order.

And it is hereby further ordered, that the aforesaid eighty-second order shall take effect immediately, and the aforesaid amended orders shall take effect on the first day of Hilary term next (1832).

ORDERS OF DECEMBER 21, 1833.¹

1.

That all writs of subpoena in this court shall be prepared by the solicitor of the party requiring the same; and that the seal for sealing the same shall be marked or inscribed with the words "Subpœna Office, Chancery,"—and such writs shall be in the forms mentioned at the foot of these orders, or as near as may be, with such alterations and variations as circumstances may require.

2.

That a *præcipe* in the usual form, and containing further the particulars hereinafter mentioned (as to the names and residences of the solicitors issuing the same), shall, in all cases, be delivered and filed at the subpoena office. And that on a subpoena for costs being sealed, the certificate or report shall be produced to the officer sealing the writ as his authority for sealing it.

3.

That the name or firm, and the place of business or residence, of the solicitor or solicitors issuing a subpoena shall be indorsed thereon; and where such solicitors shall be agents only, then there shall be further indorsed thereon the name or firm, and place of business or residence, of the principal solicitor or solicitors.

4.

That the service of subpoenas shall be effected by delivering a copy of the writ and of the indorsement thereon, and at the same time producing the original writ; and that in all cases where a subpoena might heretofore have been served by leaving the body thereof at the party's dwelling-house or otherwise than personally, it shall be sufficient to leave a copy of such subpoena in the same manner, producing the original writ to the person with whom such copy shall be so left.

5.

That every subpoena, other than a *subpœna duces tecum*, shall contain three names where necessary or required; and that a gross sum or fee of 12s. 6d. shall be the amount allowed in costs for every *subpœna duces tecum*, including the *præcipe*, attendance, and sum paid for

¹See 2 Smith Ch. Pr. (2d ed.) 472-487; 2 Bates Fed. Eq. Proc. 1147-1160.

sealing, and 5s. 10d. each for all other subpoenas; in addition to which last-mentioned sum, the solicitor suing out the same shall be allowed one fee of 6s. 8d. for the *præcipes* and attendance on sealing such subpoenas as heretofore, where the number of names included therein shall not exceed nine; and if they shall exceed nine in number, then an additional fee of 6s. 8d.; and if they exceed eighteen, a further fee of 6s. 8d.; and so in proportion for every additional number of nine names included in such subpoenas.

6.

That no more than three persons shall be included in one *subpoena duces tecum*, and that the party suing out the same shall be at liberty to sue out a subpoena for each person if it shall be deemed necessary or desirable, and that the sum of 12s. 6d. shall be allowed in costs for every such subpoena, including the *præcipe*, attendance, and sum paid for sealing the same.

7.

That the time for serving any subpoena (except for costs) shall be limited to the last day of the term next following the term or vacation in which it was sued out; and that in the interval between the suing out and service of any subpoena, the party suing out the same shall be at liberty to correct any error in the names of parties or witnesses and to have the writ resealed, upon payment to the clerk at the subpoena office of a fee of 1s., and at the same time leaving a corrected *præcipe* of such subpoena marked "altered and resealed," and signed with the name and address of the solicitor or solicitors suing out the same.

8.

That when any defendant has been taken into custody upon attachment or other process for want of appearance to a bill of revivor, and such defendant shall have been taken thereon, and shall refuse or neglect to enter an appearance to such bill within eight days after the return of such attachment, the plaintiff shall be entitled as of course, upon motion or petition, to the common order to revive; and if the defendant cannot be found so as to be taken upon such attachment, and a return of "*non est inventus*" shall have been made thereon, the plaintiff shall, upon producing such return, and an affidavit that due diligence has been used in endeavoring to execute such attachment, and that there was good reason to believe that the defend-

ant was in the county to which such attachment issued at the time of suing out the same, be also entitled as of course, upon motion or petition, at the end of eight days after the return of such attachment, to obtain the common order to revive, and that, in either of such cases, the order shall recite, as the ground for granting the same, that the defendant is in contempt, and that the time limited by the court to show cause against reviving the suit has expired.

9.

That a defendant shall be at liberty, without order, to sue out a *dedimus* to take his plea, answer, or demurrer (not demurring alone) in the country, on giving two days' notice in writing to the plaintiff's clerk in court to give commissioners' names to see the same taken, and in default thereof the defendant shall be at liberty to sue out the same, directed to his own commissioners; and in case of severe illness or other bodily infirmity, whereby a defendant, resident not more than four miles from Lincoln's Inn Hall, shall be unable to travel or leave home, he shall, upon affidavit first made thereof and duly filed, be entitled to such *dedimus* as aforesaid, on such notice first given as hereinbefore directed.

10.

That in every cause where an original or supplemental bill, or bill of revivor, has been filed subsequent to the 25th day of November last, or shall hereafter be filed, a defendant shall, after appearance and without order, be allowed eight weeks in a town cause, and ten weeks in a country cause, to plead, answer, or demur, not demurring alone, to any such original or supplemental bill, or any such bill of revivor, to which an answer is required; and five weeks in a town cause, and seven weeks in a country cause, to plead, answer, or demur, not demurring alone, to any amended bill, to which the plaintiff shall require an answer, but that twelve days only shall be allowed a defendant to demur alone to any such original, amended, or supplemental bill, or bill of revivor. And in every cause for an injunction to stay proceedings at law, if the defendant do not plead, answer, or demur to the plaintiff's bill within eight days after appearance, the plaintiff shall be entitled, as of course, upon motion, to such injunction, and if the defendant shall not, within eight days after appearance to a bill of revivor, show cause by plea, answer, or demurrer filed, the plaintiff shall be entitled, as of course, upon motion or petition, to the common order to revive, which order shall recite as the ground for grant-

ing the same, that the time limited by the court to show cause against reviving the suit has expired.

11.

That where a common injunction for want of answer is awarded, the order shall recite, as the ground for granting the same, that the defendant has omitted to put in his answer, plea, or demurrer, within the time limited by the court in that behalf.

12.

That where a defendant is in contempt to an attachment for want of appearance, the interval between the day fixed by the subpoena for appearance, and that on which the same is actually entered, shall be deducted from the time hereinbefore allowed to a defendant to plead, answer or demur, not demurring alone, to the plaintiff's bill.

13.

That the day on which an order for the plaintiff to give security for costs is served, and the period from thence to and including the day on which such security is given, shall not be reckoned in the computation of the time allowed a defendant to plead, answer, or demur.

14.

That where the plaintiff obtains an order to amend without requiring any further answer, and shall amend the bill any otherwise than by an alteration of names, dates, or sums, or the correction of clerical errors, only, the defendant shall, as of course, have eight days' time to consider whether it is necessary for him or her to answer the same, at the end of which time the plaintiff shall be at liberty to file a replication, or set down the cause for hearing on bill and answer, unless the defendant shall have previously served an order for time to answer, or taken out and served a warrant for time to answer such amended bill, in which last case the master may allow the defendant such time (if any) for that purpose, as he shall think fit.

15.

That as to all bills, whether original, amended, supplemental, or of revivor, now filed or to be filed, whenever a party may desire to make an application to a master under the said act, or under these orders, or whenever it shall be necessary to make any reference to any master,

and no previous application or reference to any master has been made in the said cause, the name of the master in rotation shall be ascertained, and entered in books to be kept as after directed in the manner hereinafter mentioned, and all applications authorized by the said recited act, or by these orders, to be made to a master, and every such reference as aforesaid, shall be made to the said master in rotation.

16.

That as to all bills which shall have been filed before this day, where any reference has been made in the cause, the name of the master to whom the last reference was made in such cause, shall, at the request of either of the parties thereto, or of his or her solicitor, and on producing such order of reference, with the master's name certified thereon, or appearing therein, be added by the six clerks to the original entry of the cause in the six clerks' book and entered in the book to be kept as hereinafter directed before any application under the said recited act shall be made in that cause, and all such applications, and all such references as aforesaid, shall be made to such last-mentioned master.

17.

That in all cases where it shall become necessary to ascertain the name of the master in rotation for the purposes of the two preceding or any succeeding orders, one of the six clerks shall give to the solicitor for the plaintiff or defendant requiring the same a certificate of the bill filed, which certificate shall, on the same or the following day, be marked by the master of the day at the public office in chancery, with the name of the master in rotation for such cause; and such certificate so marked (having first been produced to the said master in rotation, who shall cause a minute thereof to be taken), shall, on the same day, be returned to the six clerk, and filed by him; and he shall add the name of such master to the original entry of the cause in the six clerks' book, and shall also cause the name of the cause, and of such master, to be entered in a book to be kept by the six clerks for that purpose in the six clerks' office, and which shall be open to inspection at all times during office hours without fee.

18.

That where a defendant who is not in contempt, or has not entered his appearance with the registrar in manner hereinafter mentioned, submits to answer exceptions taken to a first answer before any order

to refer the same has been obtained, he shall be allowed, as of course, and without order, four weeks in a town cause, and six weeks in a country cause, to put in a further answer thereto; but if such order of reference has been obtained and served prior to such submission, then the master to whom the reference has been made shall fix the time which shall be allowed the defendant to put in such further answer.

19.

That the master to whom any exceptions to an answer for insufficiency shall be referred, shall be at liberty, in making a report upon such exceptions, if he shall think fit, to certify by whom and in what proportions (if any) the costs of such exceptions and of the reference thereon ought to be borne, and that upon the taxation of the general costs in the cause under the twenty-eighth order, pronounced on the 3d of April, 1828, regard shall be had to such certificate, and the costs to be allowed to either party shall be taxed and apportioned accordingly.

20.

That all special applications for leave to withdraw replication, as well as to amend bill, shall be heard and determined by such master in rotation, and such applications, and all other special applications under the said recited act, shall be made by taking out a warrant, at the foot whereof a notice shall be written specifying the object of the application, and the same shall be served two clear days before the return thereof.

21.

That in every order granted by a master for further time to answer, it shall be made a condition of such order, that the defendant shall enter his appearance with the registrar and consent to a serjeant-at-arms, as in the case of a commission of rebellion returned—" *non est inventus*," unless under any special circumstances the said master shall otherwise direct, and which circumstances shall be shortly stated in the order.

22.

That all orders to refer an answer, or other pleading or matter depending before the court for scandal or impertinence, shall contain a direction to the master to expunge any such scandalous or imper-

inent matter as he shall certify to be contained therein, and which shall have been the subject of the reference; and the master shall be at liberty, without further order, to tax the costs of such reference and consequent thereon, and to direct by whom the same shall be paid, and the same shall be recoverable by subpoena; but such scandalous or impertinent matter shall not be expunged, nor costs taxed, until the expiration of four days from the filing of the report of such scandal or impertinence, in order that the adverse party may have an opportunity to file exceptions to such report.

23.

That the said masters shall, on all applications to them, or either of them, by warrant under the said recited act, or under these orders or either of them, be at liberty to direct, and shall, accordingly, in the orders made thereon, order and direct whether the costs of the application shall be costs in the cause, or whether such costs, or any part thereof, shall be paid by any of the parties personally; and in the latter case, the said masters respectively shall, in such orders, either fix the sum to be paid for such costs, or tax the same at their discretion; and the party to whom such costs are directed to be paid, shall be entitled to sue out a subpoena for the same.

24.

That the master to whom any such application or reference as aforesaid shall be made, shall draw up the orders thereon in a short form, and the same, when signed by him, shall be entered in a book to be kept for that purpose in the office of such master, and shall then be marked by the said master, or his chief clerk, as entered, and he shall sign his initials thereto in this form: "Ent. A. B.;" and the said orders shall then be binding, (unless reversed or varied on appeal), and shall be enforced in like manner as if made by the court; and the original order, or any duplicate thereof, which the master is directed to grant on the application of any party, so signed and entered as aforesaid, shall be a sufficient warrant to every officer of the court to do the act therein mentioned, or to permit the same to be done; and each party shall be at liberty to inspect the entry of all such orders in the said entering book, without fee.

25.

That in case it shall become necessary to make any application to a master under the said recited act during the period between the

last seal after Trinity term, and the seal next before Michaelmas term, such application shall be made to the sitting master of the vacation, and his decision and order thereon shall be equally binding, and acted upon and enforced in the same way and manner as if made by the master in rotation, to whom the same has or ought otherwise to have been referred; but all subsequent applications and all references in the cause shall be made to such master in rotation.

26.

That a defendant shall not be at liberty to serve a notice of motion to dismiss for want of prosecution, until after the time, limited by the rules of the court within which a plaintiff may obtain an order to amend as to such defendant, shall have expired, any thing in any former order contained to the contrary notwithstanding.

27.

That each registrar shall attend in succession the three several courts of the lord chancellor, the master of the rolls, and the vice-chancellor.

That for the purpose of avoiding, as much as may be, expense and delay in the drawing of the decrees and orders of this court, it is hereby directed that, except in orders for special injunctions, in which the usual recitals shall be inserted as heretofore, neither the bill, nor answers, nor any part thereof, be stated or recited in the original decree or order, and that no part of the master's report be stated in any decree upon further directions, except the master's finding, or opinion upon the subject referred to him; and that in orders made upon petitions no part of the petition be stated or recited except the prayer; and that the same principle of brevity be observed in all the orders of this court made upon motion, so far as may be consistent with a statement explaining the grounds upon which the order is made. And for the better understanding of this order, certain forms of decrees and orders drawn pursuant hereto are subjoined. And it is hereby directed that such forms shall be observed in all cases as nearly as may be, and that before any order made on a petition be passed, the original petition be filed with the clerk of the reports.

28.

That in all cases where any sums of money or any securities or other effects belonging to the suitors of the court of chancery shall

be directed to be paid into or deposited in the Bank of England in the name and with the privity of the accountant general of the said court; and in all cases where any such sum of money or any securities or other effects be directed to be paid out, or invested in the purchase of securities, transferred or carried over or delivered out, the exact sum of money and amount of securities so to be paid out, invested, transferred, or carried over, be ascertained by the registrar and specified and expressed in the order of court in words written at length, except in the case of residues of money or securities remaining after a portion directed to be applied for particular purposes, the amount of which cannot be ascertained at the time of making the said order, in which cases the order shall direct that the amount of such residues and shares of residues shall be ascertained and specified by affidavit.

And that in all cases where a residue of cash or securities shall be directed by any order to be operated upon by the accountant general, the exact amount of such residue, where the same can be done, shall be ascertained by the registrars, and expressed and specified in the order in words at length, so that the amount of such residue shall appear on the face of the order.

And that all persons (whether representatives or others) who shall be directed to pay in, transfer, or deposit any sum of money, securities, or other effects in the name of the accountant general, and all persons (whether representatives or others) to whom any sums of money, securities, or other effects, shall be directed to be paid out, transferred, carried over, or delivered out by the accountant general, shall be described by name, except in the case of bodies corporate, companies, or societies, in such order, and not merely as plaintiffs or petitioners, or the like; except in cases of payments, transfers, or carryings over, directed to be made to or by representatives, where no probate or letters of administration shall have been taken out at the time of making such orders, and the Christian and surnames or titles of honor of all such persons, and the titles of all such bodies corporate, companies, and societies, shall be written at length and without abbreviations in such orders.

That in all orders directing the payment of dividends and annuities, the time when the first of such payments shall be made, and when all subsequent periodical payments, whether quarterly, half-yearly, yearly, or otherwise, shall be made, shall be specified and expressed in words at length.

That all orders, directing the laying out of sums of money of uncertain amount in the purchase of securities, do direct that such investments shall be made when the money shall amount to a competent sum, and not sooner.

That in all cases where it shall be referred to a master of the court of chancery to ascertain and apportion the amount of money or securities to be paid into the Bank of England, in the name and with the privity of the accountant general, or of any securities to be carried over or transferred to the accountant general, or to ascertain or apportion the amount of money to be paid out or invested in the purchase of securities to be paid out, or of securities to be sold, carried over, or transferred by the accountant general, the exact amount of such money or securities respectively shall be ascertained by the masters, and stated in the report in words at length; except in the case of residue of money or securities remaining after a portion directed to be applied to certain purposes, and the amount of which portions cannot be ascertained at the time of making such report, in which case the amount of such residue and portions shall be ascertained by affidavit.

And that in all cases where a residue of cash or securities shall be directed by an order to be operated upon by the accountant general, the exact amount of such residue, where the same can be done, shall be ascertained by the masters, and expressed and specified in the order in words at length, so that the amount of such residue shall appear on the face of the order.

And in all such cases, the person by or to whom money is to be paid, or securities carried over or transferred as aforesaid, shall be described by name, except in the case of bodies corporate, companies, or societies, in such reports, and not merely as plaintiffs or petitioners or the like, except in the cases of payments, transfers, or carryings over, directed to be made to or by representatives, where no probate or letters of administration shall have been taken out at the time of making the said report, and the Christian and surnames, or titles of honor of all such persons, and the titles of all such bodies corporate, companies, and societies shall be written at full length in the said report.

29.

That with a view to the convenience of the suitors and their solicitors, and for the purpose of diminishing the expense of orders on petitions of course, which, according to the practice of the court,

may be presented to the master of the rolls, one of the secretaries of the master of the rolls shall, upon any such petitions of course (except upon petitions for setting down causes to be reheard), which shall be presented to his honor, instead of answering such petitions as heretofore, draw up the orders thereon in such form as the master of the rolls shall from time to time direct, every such order to be signed as passed with the initials of such secretary; and the under secretary shall enter, or cause to be entered, every such order in a book to be kept at the secretary's office at the rolls for that purpose, and shall then mark and sign such order with his initials, as entered; and the suitors of the court and their solicitors shall have access to the said book, during office hours, without the payment of any fee; and for every such order so to be made, as aforesaid, there shall be paid the same fees as have hitherto been payable in respect of such petitions as aforesaid, in lieu of the fees on such petitions. And there shall be also paid to the chief secretary, for filing every such petition, the sum of 1*s.*; and to the under secretary, for entering every such order, the sum of 6*d.* And every such order so to be made as aforesaid, shall have the same force and effect as orders of course passed by the registrars now have, and without the payment of the fees heretofore payable on such orders at the registrar's office; and for every office copy that may be required of any such order, there shall be paid to the chief secretary (who shall mark the same as examined, and authenticate it by affixing his initials thereto) the sum of 6*d.*, and no more, for making the same.

30.

That the duties to be performed in the office of the master of reports and entries shall be carried on as the same were heretofore done by the master of the report office; and that all decrees and orders of the High Court of Chancery shall be entered by the clerks of entries under the direction of the master of reports and entries.

That proper calendars or indexes shall be kept by the clerks of entries, so that the same may be conveniently referred to when required; and such calendars or indexes, and the books of entries, shall, at all times during office hours, be accessible to the public, on payment of the usual fees.

That all reports, and exceptions to reports and petitions, shall be left with the clerk of reports, to be by him filed or preserved under the direction of the master of reports and entries; and all office copies thereof, or of any part thereof, that may be required, shall

be ready to be delivered to the party requiring the same within forty-eight hours after the same shall be bespoken; and that all decrees shall be entered within one week after the same shall be left for entry, and that all such entries shall be examined by one of the clerks of entries, and be marked with his initials, to denote such examination.

That proper indexes or calendars to the files or bundles of the reports, and exceptions to reports and petitions, shall be kept, so that the same may be conveniently referred to when required; and such calendars and indexes, and the said original reports and exceptions to reports and petitions, shall, at all times during office hours, be accessible to the public, on payment of the usual fees.

That, in addition to such calendars, the said clerks of reports shall enter in a book, to be kept by them for that purpose, the time when any report and set of exceptions is delivered to them to be filed, with the name of the cause and the date of the report, and, as regards exceptions, the names of the parties excepting, and such book shall, at all times during office hours, be accessible to the public.

31.

That all office copies in all the offices of the court shall be written on foolscap paper bookwise, and shall contain two folios in each page, except as to office copies of bills, which shall contain only one folio, such folios to consist of ninety words each, and to be reckoned as to schedules according to the manner directed by the general order of this court, bearing date the 28th day of November, 1743.

32.

That the last interrogatory now commonly in use be in future altered, and shall stand and be in the words or to the effect following: "Do you know, or can you set forth, any other matter or thing which may be of benefit or advantage to the parties at issue in this cause, or either of them, or that may be material to the subject of this your examination, or to the matters in question in this cause; if yea, set forth the same," etc.

33.

That the masters extraordinary of this court shall be at liberty in future to take any affidavit, or do any other act incident to the office of master extraordinary in chancery, at any place which is distant

not less than ten miles from the Hall in Lincoln's Inn, any existing order to the contrary notwithstanding.

34.

That the fees set forth in the schedule after stated shall constitute the schedule of fees to be received by the masters and their clerks, and the registrars and their clerks, under the said recited act.

35.

That, except as may be herein otherwise directed, the offices of this court shall continue open for the despatch of business, and the officers and clerks belonging thereto shall attend in such offices in the discharge of their business, during such times and for such number of hours in each day as they have hitherto done under any existing order or practice of the said court.

36.

That the office of the clerk of the affidavits and of the patentee of the subpoena office, be open from the hour of ten in the forenoon until four in the afternoon, and during the sitting of either of the courts, from the hour of seven to eight in the evening, except that from the 1st of September to the 20th of October those offices shall be open only from eleven to one o'clock.

That all copies of affidavits be ready for delivery within forty-eight hours after any copy shall be bespoken.

ORDERS OF MAY 9, 1839.¹

1.

That in all cases in which it shall be alleged that the plaintiff is prosecuting the defendant, in this court and also in some other court, for the same matter, the defendant in eight days after filing his answer or further answer to the plaintiff's bill, shall be entitled, as of course, on motion or petition, to the usual order for the plaintiff to make his election in which court he will proceed, with the usual directions in that behalf, unless the plaintiff shall, before the expiration of the same eight days, have delivered exceptions to the defendant's answer, or have referred his further answer on former exceptions. And in case the plaintiff shall have delivered such exceptions,

¹ See 2 Bates Fed. Eq. Proc. 1161-1163,
Eq. Prac. Vol. III.—110.

or referred the defendant's further answer within such time, the defendant shall be at liberty, by notice in writing to be served on the plaintiff's clerk in court, to require the plaintiff to procure the master's report on such exceptions, within four days from the service of such notice. And if the plaintiff, being so served with such notice, shall not procure the master's report in four days accordingly, or if the exceptions shall not be allowed, the defendant shall then be entitled, as of course, on motion or petition, to the usual order for the plaintiff to elect in which court he will proceed, with the usual directions. But in either of such cases, the plaintiff shall be at liberty to move that such order may be discharged on the merits confessed in the answer.

2.

That the plaintiff in any injunction cause having obtained the common injunction to stay proceedings at law, may (either before or after the answer of the defendant shall be put in, and whether such injunction shall or shall not have been continued to the hearing of the cause) obtain an order, as of course, for leave to amend the bill without prejudice to the injunction; but that such order shall contain an undertaking by the plaintiff to amend the bill within one week after the date of the order and in default thereof the order shall become void. And that in case the bill shall be amended pursuant to such order, the defendant shall thereupon, and although he may not have put in his answer to the bill or the amendments thereof, be at liberty to move the court on notice, to dissolve the injunction, on the ground that the bill as amended does not, even if the amendments be true, entitle the plaintiff thereto.

3.

That in case an injunction to stay proceedings at law shall be prayed for by the bill, and shall either not be obtained, or, having been obtained, shall have been dissolved upon the merits stated in the answer, and the plaintiff shall afterwards amend his bill, and the defendant shall not plead, answer or demur to the amended bill within eight days after appearance, the plaintiff shall be entitled to move for an injunction, upon affidavit of the truth of the amendments.

4.

That foreclosure causes, when ready for hearing, may be ordered to be advanced for hearing, under the same circumstances, and sub-

ject to the same rules as other causes may be ordered to be so advanced.

5.

That in all cases in which it shall appear that certain preliminary accounts and inquiries must be taken and made, before the rights and interests of the parties to the cause can be ascertained, or the questions therein arising can be determined, the plaintiff shall be at liberty, at any time after the defendants shall have appeared to the bill, to move the court on notice, that such inquiries and accounts shall be made and taken; and that an order referring it to the master to make such inquiries, and take such accounts, shall thereupon be made, without prejudice to any question in the cause, if it shall appear to the court that the same will be beneficial to such (if any) parties to the cause as may not be competent to consent thereto, and that the same is consented to by such (if any) of the defendants, as being competent to consent, have not put in their answer to the bill, and that the same is consented to by, or is proper to be made upon the statements contained in the answers of, such (if any) of the defendants as have answered the bill.

6.

That whenever any order of course obtained from the master of the rolls, in any cause marked for or set down to be heard before the lord chancellor pursuant to the general order of the 5th day of May, 1837, shall be alleged to have been irregularly obtained, any application to discharge the same for irregularity shall in the first instance be made to the master of the rolls, and such cause and all other applications to be made therein, shall nevertheless continue subject to all the regulations of the said general order, as if this order had not been made.

ORDERS OF MAY 10, 1839.¹

1.

That every person, to whom in any cause or matter pending in this court, any sum of money or any costs have been ordered to be paid, shall, after the lapse of one month from the time when such order for payment was duly passed and entered, be entitled by his clerk in court to sue out one or more writ or writs of *fieri facias*, or writ or writs

¹ See 2 Bates Fed. Eq. Proc. 1168-1164.

of *elegit*, of the form hereinafter stated, or as near thereto as the circumstances of the case may require.

2.

That upon every such order hereafter to be entered, the entering clerk of this court, in whose division the same may be, shall, at the request of the party leaving the same, mark the day of the month and year on which the same shall be so left for entry, and no writ of *feri facias* or *elegit* shall be sued out upon any such order, unless the date of such entry shall be so marked thereon as aforesaid.

3.

That such writs, when sealed, shall be delivered to the sheriff or other officer to whom the execution of the like writs issuing out of the superior courts of common law belongs, and shall be executed by such sheriff or other officer, as nearly as may be, in the same manner in which he doth or ought to execute such like writs; and such writs, when returned by such sheriff or other officer, shall be delivered to the clerks in court, by whom respectively they were sued out, or be left at their respective seats, and shall thereupon be filed as of record in the office of the six clerks of this court. And that for the execution of such writs, such sheriff or other officer shall not take or be allowed any fees, other than such as are or shall be from time to time allowed by the lawful authority, for the execution of the like writs issuing out of the superior courts of common law.

4.

That if it shall appear upon the return of any such writ of *feri facias* as aforesaid, that the sheriff or other officer hath by virtue of such writ seized but not sold any goods of the person ordered to pay such sum of money or costs as aforesaid, the person to whom such sum of money or costs is payable, shall, immediately, after such writ with such return shall be filed as of record, be at liberty by his clerk in court to sue out a writ of *venditioni exponas* in the form hereinafter stated, or as near thereto as the circumstances of the case may require.

5.

That on every such writ of *feri facias* and *elegit* so to be issued as aforesaid, there shall be indorsed the words, "By the court," and also thereunder the calling and place of residence of the party against

whom such writ shall be issued, and also the name and residence or place of business of the solicitor at whose instance the same shall be issued, and the name of the clerk in court issuing the same, and that every such writ be also indorsed for the sum to be levied according to the form used upon like writs issuing out of the superior courts of common law.

6.

That for every such writ of *feri facias* or *venditioni exponas* so to be issued as aforesaid, there shall be allowed to the clerk in court issuing the same the sum of eighteen shillings and sevenpence, and for every such writ of *elegit* the sum of one pound ten shillings, and that there be allowed to the solicitor at whose instance any such writ of *feri facias*, *elegit*, or *venditioni exponas* shall be issued, the sum of six shillings and eightpence for instructions for the said writ, and that there be also allowed to such solicitor the further sum of six shillings and eightpence for attending to procure a warrant, and for attending to instruct the officer charged with the execution of such writ.

ORDERS OF AUGUST 26, 1841.¹

1.

That there shall forthwith be prepared a proper alphabetical book for the purposes after mentioned, and that such book shall be called the solicitors' book, and shall be publicly kept at the office of the six clerks, to be there inspected without fee or reward.

2.

That every solicitor, before he practice in this court, in his own name solely, and not by an agent, whose name shall be duly entered as after mentioned, and every solicitor, before he practice as such agent, shall cause to be entered in the solicitors' book in alphabetical order, his name and place of business, or some other proper place in London, Westminster, or the borough of Southwark, or within two miles of Lincoln's Inn Hall, where he may be served with writs, notices, orders, warrants, rules, and other documents, proceedings, and written communications in causes and matters depending in this court; and as often as any such solicitor shall change his place of

¹ See Craig & Phillips' Reports, 366-382; 2 Bates Fed. Eq. Proc. 1176-1188.

business or the place where he may be served as aforesaid, he shall cause a like entry thereof to be made in the solicitors' book; and that the above-mentioned entries shall be made in such book by the said six clerks, who shall be entitled to a fee of 1s. for every such entry; and that the fund arising from such payment shall be applied, in the first instance, in paying the expenses of providing and keeping such book.

3.

That all writs, notices, orders, warrants, rules, and other documents, proceedings and written communications, which do not require personal service upon the party to be affected thereby, shall be deemed sufficiently served if such document, or a copy thereof, as the case may be, shall be left at the place lastly entered in the solicitors' book by the solicitor of such party; and if any solicitor shall neglect to cause such entry to be made in the solicitors' book as is required by the second order, then the fixing up a copy of any such writ, notice, order, warrant, rule, or other document, proceeding, or written communication for such solicitor in the said six clerks' office, shall be deemed a sufficient service on him, unless the court shall, under special circumstances, think fit to direct otherwise.

4.

That if any solicitor shall give his consent in writing that the service of all or any writs, notices, orders, warrants, rules, or other documents may be made upon him through the postoffice or otherwise, such service shall be deemed sufficient if made in such manner as such solicitor shall have so agreed to accept; but it shall be competent for any solicitor giving such consent, at any time to revoke the same by notice in writing.

5.

That no person shall be allowed to appear or act, either in person, by solicitor or counsel, or to take any proceedings whatever in this court, either as plaintiff, defendant, petitioner, respondent, party intervening, or otherwise, until an entry of the name of his solicitor and his solicitor's agent, if there be one, or if he act in person, his own name, and address for service shall have been made in the solicitors' book at the office of the six clerks; but if such address of any person so acting in person shall not be within London, Westminster, or the borough of Southwark, or within two miles of Lincoln's Inn Hall,

then all services upon such person, not requiring to be made personally, shall be deemed sufficient if a copy of the writ, notice, order, warrant, rule, or other document to be served, be transmitted to him through Her Majesty's postoffice, to such address as aforesaid.

6.

That no writ of attachment with proclamations, nor any writ of rebellion, be hereafter issued for the purpose of compelling obedience to any process, order, or decree of the court.

7.

That no order shall hereafter be made for a messenger, or for the serjeant-at-arms, to take the body of the defendant for the purpose of compelling him to appear to the bill.

8.

That if the defendant, being duly served with a subpoena to appear to and answer the bill, shall refuse or neglect to appear thereto, the plaintiff shall, after the expiration of eight days from such service, be at liberty to apply to the court for leave to enter an appearance for the defendant. And the court, being satisfied that the subpoena has been duly served, and that no appearance has been entered by the defendant, may give such leave accordingly; and that thereupon the plaintiff may cause an appearance to be entered for the defendant. And thereupon such further proceedings may be had in the cause as if the defendant had actually appeared.

9.

That upon the sheriff's return, "*non est inventus*," to an attachment issued against the defendant for not answering the bill, and upon affidavit made that due diligence was used to ascertain where such defendant was at the time of issuing such writ, and in endeavoring to apprehend such defendant under the same, and that the person suing forth such writ verily believed, at the time of suing forth the same, that such defendant was in the county into which such writ was issued, the plaintiff shall be entitled to a writ of sequestration in the same manner that he is now entitled to such writ, upon the like return made by the serjeant-at-arms.

10.

That no writ of execution nor any writ of attachment shall hereafter be issued for the purpose of requiring or compelling obedience to any order or decree of the High Court of Chancery; but that the party required by any such order to do any act shall, upon being duly served with such order, be held bound to do such act in obedience to the order.

11.

That if any party who is by an order or decree ordered to pay money, or do any other act in a limited time, shall, after due service of such order, refuse or neglect to obey the same according to the exigency thereof, the party duly prosecuting such order shall, at the expiration of the time limited for the performance thereof, be entitled to an order for a serjeant-at-arms, and such other process as he hath hitherto been entitled to upon a return, "*non est inventus*," by the commissioners named in a commission of rebellion issued for non-performance of a decree or order.

12.

That every order or decree requiring any party to do an act thereby ordered, shall state the time after service of the decree or order within which the act is to be done; and that upon the copy of the order, which shall be served upon the party required to obey the same, there shall be indorsed a memorandum, in the words, or to the effect following, viz.: "If you, the within named A. B., neglect to perform this order by the time therein limited, you will be liable to be arrested by the serjeant-at-arms attending the High Court of Chancery; and also be liable to have your estate sequestered for the purpose of compelling you to obey the same order."

13.

That upon due service of a decree or order for delivery of possession, and upon proof made of demand and refusal to obey such order, the party prosecuting the same shall be entitled to an order for a writ of assistance.

14.

That the memorandum at the foot of the subpoena to appear and answer, shall hereafter be in the form following; that is to say.—

"Appearances are to be entered at the six clerks' office in Chancery Lane, London; and if you do not cause your appearance to be entered within the time limited by the above writ, the plaintiff will be at liberty to enter an appearance for you; and you will be subject to an attachment and the other consequences of not answering the plaintiff's bill, if you do not put in your answer thereto within the time limited by the General Orders of the court for that purpose."

15.

That every person not being a party in any cause, who has obtained an order, or in whose favor an order shall have been made, shall be entitled to enforce obedience to such order by the same process as if he were a party to the cause; and every person, not being a party in any cause against whom obedience to any order of the court may be enforced, shall be liable to the same process for enforcing obedience to such order as if he were a party to the cause.

16.

That a defendant shall not be bound to answer any statement or charge in the bill, unless specially and particularly interrogated thereto; and a defendant shall not be bound to answer any interrogatory in the bill, except those interrogatories which such defendant is required to answer; and where a defendant shall answer any statement or charge in the bill, to which he is not interrogated, only by stating his ignorance of the matter so stated or charged, such answer shall be deemed impertinent.

17.

That the interrogatories contained in the interrogating part of the bill shall be divided as conveniently as may be from each other, and numbered consecutively 1, 2, 3, etc.; and the interrogatories which each defendant is required to answer shall be specified in a note at the foot of the bill, in the form or to the effect following; that is to say,—
"The defendant A. B. is required to answer the interrogatories numbered respectively, 1, 2, 3, etc.;" and the office copy of the bill taken by each defendant shall not contain any interrogatories except those which such defendant is so required to answer, unless such defendant shall require to be furnished with a copy of the whole bill.

18.

That the note at the foot of the bill, specifying the interrogatories which each defendant is required to answer, shall be considered and treated as part of the bill, and the addition of any such note to the bill, or any alteration in or addition to such note after the bill is filed, shall be considered and treated as an amendment of the bill.

19.

That instead of the words of the bill now in use preceding the interrogating part thereof, and beginning with the words "To the end, therefore," there shall hereafter be used words in the form or to the effect following: "To the end, therefore, that the said defendants may, if they can, show why your orator should not have the relief hereby prayed, and may, upon their several and respective corporal oaths, and according to the best and utmost of their several and respective knowledge, remembrance, information, and belief, full, true, direct, and perfect answer make to such of the several interrogatories hereinafter numbered and set forth as by the note hereunder written they are respectively required to answer; that is to say,—

"1. Whether, etc.

"2. Whether, etc."

20.

That a defendant in a country cause shall be allowed no further time for pleading, answering, or demurring to any original or supplemental bill, or bill of revivor, or to any amended bill, than is now allowed to a defendant in a town cause.

21.

That after the expiration of the time allowed to a defendant to plead, answer, or demur (not demurring alone) to an original bill, if the defendant shall have filed no plea, answer, or demurrer, the plaintiff shall be at liberty to file a note at the six clerks' office to the following effect: "The plaintiff intends to proceed with his cause as if the defendant had filed an answer, traversing the case made by the bill, and the plaintiff had replied to such answer, and served a subpoena to rejoin." And that a copy of such note shall be served on such defendant in the same manner as a subpoena to rejoin is now served, and such note when filed (a copy thereof being so served) shall have the same effect as if the defendant had filed an answer, traversing the whole of the bill, and the plaintiff had filed a replication to such answer, and served a subpoena to rejoin. And after

such note shall have been so filed, and a copy served as aforesaid, the defendant shall not be at liberty to plead, answer, or demur to the bill without the special leave of the court.

22.

That a plaintiff shall not be at liberty to file a note under the twenty-first order, until he has obtained an order of the court for that purpose, which order shall be applied for upon motion, without notice, and shall not be made unless the court shall be satisfied that the defendant has been served with a subpoena to appear and answer the bill, and that the time allowed to the defendant to plead, answer, or demur, not demurring alone, has expired.

23.

That where no account, payment, conveyance, or other direct relief is sought against a party to a suit, it shall not be necessary for the plaintiff to require such party, not being an infant, to appear to and answer the bill. But the plaintiff shall be at liberty to serve such party, not being an infant, with a copy of the bill, whether the same be an original, or amended, or supplemental bill, omitting the interrogating part thereof; and such bill as against such party, shall not pray a subpoena to appear and answer, but shall pray that such party, upon being served with a copy of the bill, may be bound by all the proceedings in the cause. But this order is not to prevent the plaintiff from requiring a party against whom no account, payment, conveyance, or other direct relief is sought, to appear to and answer the bill, or from prosecuting the suit against such party in the ordinary way, if he shall think fit.

24.

That where a plaintiff shall serve a defendant with a copy of the bill under the twenty-third order, he shall cause a memorandum of such service, and of the time when such service was made, to be entered in the six clerks' office, first obtaining an order of the court for leave to make such entry, which order shall be obtained upon motion without notice, upon the court being satisfied of a copy of the bill having been so served, and of the time when the service was made.

25.

That where a defendant shall have been served with a copy of the bill under the twenty-third order, and a memorandum of such service

shall have been duly entered, and such defendant shall not within the time limited by the practice of the court for that purpose, enter an appearance in common form, or a special appearance under the twenty-seventh order, the plaintiff shall be at liberty to proceed in the cause, as if the party served with a copy of the bill were not a party thereto, and the party so served shall be bound by all the proceedings in the cause, in the same manner as if he had appeared to and answered the bill.

26.

That where a party shall be served with a copy of the bill under the twenty-third order, such party, if he desires the suit to be prosecuted against himself in the ordinary way, shall be entitled to have it so prosecuted; and in that case he shall enter an appearance in the common form, and the suit shall then be prosecuted against him in the ordinary way; but the costs occasioned thereby shall be paid by the party so appearing, unless the court shall otherwise direct.

27.

That where a party shall be served with a copy of the bill under the twenty-third order, and shall desire to be served with a notice of the proceedings in the cause, but not otherwise to have the same prosecuted against himself, he shall be at liberty to enter a special appearance under the following form; that is to say, "A. B. appears to the bill for the purpose of being served with notice of all proceedings therein." And thereupon, the party entering such appearance shall be entitled to be served with notice of all proceedings in the cause, and to appear thereon. But the costs occasioned thereby shall be paid by the party entering such appearance, unless the court shall otherwise direct.

28.

That a party shall not be at liberty to enter such special appearance under the twenty-seventh order, after the time limited by the practice of the court for appearing to a bill in the ordinary course, without first obtaining an order of the court for that purpose, such order to be obtained on notice to the plaintiff; and the party so entering such special appearance shall be bound by all the proceedings in the cause, prior to such special appearance being so entered.

29.

That where no account, payment, conveyance, or other relief is sought against a party, but the plaintiff shall require such party to appear to and answer the bill, the costs occasioned by the plaintiff having required such party so to appear and answer the bill, and the costs of all proceedings consequential thereon, shall be paid by the plaintiff, unless the court shall otherwise direct.

30.

That in all suits concerning real estate which is vested in trustees by devise, and such trustees are competent to sell and give discharges for the proceeds of the sale, and for the rents and profits of the estate, such trustees shall represent the persons beneficially interested in the estate or the proceeds, or the rents and profits, in the same manner, and to the same extent, as the executors or administrators in suits concerning personal estate represent the persons beneficially interested in such personal estate; and in such cases it shall not be necessary to make the persons beneficially interested in such real estate, or rents and profits, parties to the suit; but the court may upon consideration of the matter on the hearing, if it shall so think fit, order such persons to be made parties.

31,

That in suits to execute the trusts of a will, it shall not be necessary to make the heir at law a party; but the plaintiff shall be at liberty to make the heir at law a party where he desires to have the will established against him.

32.

That in all cases in which the plaintiff has a joint and several demand against several persons, either as principals or sureties, it shall not be necessary to bring before the court, as parties to a suit concerning such demand, all the persons liable thereto; but the plaintiff may proceed against one or more of the persons severally liable.

33.

That where a demurrer or plea to the whole bill shall be overruled, the plaintiff, if he does not require an answer, shall be at liberty immediately to file his note in manner directed by the twenty-first order, and with the same effect, unless the court shall, upon over-

ruling such demurrer or plea, give time to the defendant to plead, answer, or demur; and in such case, if the defendant shall file no plea, answer, or demurrer, within the time so allowed by the court, the plaintiff, if he does not require an answer, shall, on the expiration of such time, be at liberty to file such note.

34.

That where the defendant shall file a demurrer to the whole bill, the demurrer shall be held sufficient, and the plaintiff be held to have submitted thereto, unless the plaintiff shall, within twelve days from the expiration of the time allowed to the defendant for filing such demurrer, cause the same to be set down for argument; and where the demurrer is to part of the bill, the demurrer shall be held sufficient, and the plaintiff be held to have submitted thereto, unless the plaintiff shall, within three weeks from the expiration of the time allowed for filing such last-mentioned demurrer, cause the same to be set down for argument.

35.

That where the defendant shall file a plea to the whole or part of a bill, the plea shall be held good to the same extent and for the same purpose as a plea allowed upon argument, unless the plaintiff shall, within three weeks from the expiration of the time allowed for filing such plea, cause the same to be set down for argument, and the plaintiff shall be held to have submitted thereto.

36.

That no demurrer or plea shall be held bad and overruled upon argument, only because such demurrer or plea shall not cover so much of the bill as it might by law have extended to.

37.

That no demurrer or plea shall be held bad and overruled upon argument, only because the answer of the defendant may extend to some part of the same matter as may be covered by such demurrer or plea.

38.

That a defendant shall be at liberty by answer to decline answering any interrogatory or part of an interrogatory, from answering which he might have protected himself by demurrer; and that he

shall be at liberty so to decline, notwithstanding he shall answer other parts of the bill from which he might have protected himself by demurrer.

39.

That where the defendant shall, by his answer, suggest that the bill is defective for want of parties, the plaintiff shall be at liberty, within fourteen days after answer filed, to set down the cause for argument upon that objection only; and the purpose for which the same is so set down shall be notified by an entry, to be made in the registrar's book, in the form or to the effect following; that is to say, "Set down upon the defendant's objection for want of parties;" and that where the plaintiff shall not so set down his cause, but shall proceed therewith to a hearing, notwithstanding an objection for want of parties taken by the answer, he shall not, at the hearing of the cause, if the defendant's objection shall then be allowed, be entitled as of course, to an order for liberty to amend his bill by adding parties. But the court, if it thinks fit, shall be at liberty to dismiss the bill.

40.

That if a defendant shall, at the hearing of a cause, object that a suit is defective for want of parties, not having by plea or answer taken the objection, and therein specified by name or description the parties to whom the objection applies, the court (if it shall think fit) shall be at liberty to make a decree saving the rights of the absent parties.

41.

That where a defendant in equity files a cross-bill against the plaintiff in equity for discovery only, the costs of such bill, and of the answer thereto, shall be in the discretion of the court at the hearing of the original cause.

42.

That where a defendant in equity files a cross-bill for discovery only against the plaintiff in equity, the answer to such cross-bill may be read and used by the party filing such cross-bill, in the same manner and under the same restrictions as the answer to a bill praying relief may now be read and used.

43.

That in cases in which any exhibit may by the present practice of the court be proved *viva voce* at the hearing of a cause, the same may be proved by the affidavit of the witness who would be competent to prove the same *viva voce* at the hearing.

44.

That where a defendant makes default at the hearing of a cause, the decree shall be absolute in the first instance, without giving the defendant a day to show cause, and such decree shall have the same force and effect as if the same had been a decree *nisi* in the first instance, and afterwards made absolute in default of cause shown by the defendant.

45.

That every decree for an account of the personal estate of a testator or intestate shall contain a direction to the master to inquire and state to the court what parts (if any) of such personal estate are outstanding or undisposed of, unless the court shall otherwise direct.

46.

That a creditor, whose debt does not carry interest, who shall come in and establish the same before the master, under a decree or order in a suit, shall be entitled to interest upon his debt, at the rate of £4 per cent. from the date of the decree, out of any assets which may remain after satisfying the costs of the suit, the debts established, and the interest of such debts as by law carry interest.

47.

That a creditor who has come in and established his debt before the master under a decree or order in a suit, shall be entitled to the costs of so establishing his debt, and the same shall be taxed by the master, and added to the debt.

48.

That in the reports made by the masters of the court, no part of any state of facts, charge, affidavit, deposition, examination, or answer, brought in or used before them, shall be stated or recited. But such state of facts, charge, affidavit, deposition, examination, or answer shall be identified, specified, and referred to, so as to inform

the court what state of facts, charge, affidavit, deposition, examination or answer were so brought in or used.

49.

That it shall not be necessary in any bill of revivor, or supplemental bill, to set forth any of the statements in the pleadings in the original suit, unless the special circumstances of the case may require it.

50.

That in any petition of rehearing of any decree or order made by any judge of the court, it shall not be necessary to state the proceedings anterior to the decree or order appealed from, or sought to be reheard.

51.

That the foregoing orders shall take effect as to all suits, whether now depending or hereafter commenced, on the last day of Michaelmas term, one thousand eight hundred and forty-one.

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FORM NO. 1.

BILL TO ENJOIN INFRINGEMENT OF PATENT.

In the United States Circuit Court,
in and for the
Southern District of New York. } In Equity.

To the Honorable the Judges of the Circuit Court of the United States in and for the Southern District of New York, in Chancery Sitting:

John Doe, residing in the city of New York, in the state of New York, and a citizen of the state of New York, brings this his bill of complaint against Richard Roe, of the city of New York, in the state of New York, and a citizen of said state of New York and inhabitant of said southern district of New York.

And thereupon your orator complains and says that before the tenth day of May, eighteen hundred and ninety-eight, John Doe, of the city of New York, was the true, original, and first inventor of a certain new and useful improvement in pipes, not known or used by others before his said invention thereof, and which had not at the time of his application for a patent therefor been in public use or on sale with his consent or allowance for a period of more than two years, as your orator verily believes.

And your orator further shows unto your honors, that John Doe, as being the inventor of said improvement, made application to the proper department of the government of the United States for letters patent therefor, in accordance with the then existing laws of the United States, and he having duly complied, in all respects, with the conditions and requisitions of said laws, such proceedings were had, that on the tenth day of October, eighteen hundred and ninety-eight, letters patent of the United States for the said improvement and invention, under the seal of the patent-office of the United States, signed by the secretary of the interior, and countersigned by the commissioner of patents, and bearing date the day and year last aforesaid, were issued in due form of law, and delivered to said John Doe, whereby was granted and secured to him and his heirs or assigns, for the term of seventeen years from the day of the date thereof, the full and exclusive right of making, using, and vending to others to be used,

the said improvement and invention, a description whereof is given in the words of the said inventor in a schedule in writing, accompanied by drawings and references thereto, duly annexed to said letters patent, when the same were issued, and made a part thereof, as by the said original letters patent, or a duly authenticated copy thereof, in court to be produced, will fully appear; a copy of which, without the drawings, is hereto annexed, forming part of this bill, and marked Exhibit A.

And your orator further shows unto your honors, that the said improvements patented as aforesaid have hitherto been in the exclusive possession of said John Doe; that they have been by him introduced into practical use, and have proved to be valuable to the public, and have been, and still are, of great value to your orator; that your orator has expended large sums of money in developing and introducing into use pipes containing the said improvements, and he engaged in the business of manufacturing and selling such pipes, and that but for the infringement herein complained of your orator would now be in undisturbed possession and enjoyment of the exclusive rights and privileges secured by said patent.

And your orator further shows unto your honors, that the several improvements patented, and claimed in and by said last mentioned letters patent, and by the several claims thereof, pertain to the same subject-matter, and are adapted to be used together, and are capable of being embodied and used together in a single pipe, and are so embodied and used by the defendant.

And your orator further shows that the said defendant, as your orator is informed and believes, well knowing the premises, without any right or authority, and in violation of your orator's said rights, has within the said southern district of New York and since the issue and during the term of said letters patent made, or caused to be made for use, and has vended to others to be used, a large number of pipes, but how many your orator cannot state, but prays that the defendant may discover and set forth the number of the same which contain substantially the improvements so patented, as aforesaid, by said last mentioned letters patent, and said defendant persists in making and selling said patented improvements, though warned to desist, and is now making, or causing to be made, for sale and use, and is now selling to be used, and threatens and gives out that he will continue to make, and vend to be used, pipes containing said patented improvements, or some material part thereof; and your orator fears that the defendant will in future infringe upon the exclusive rights secured to your orator as aforesaid; whereby great gains and profits have accrued, and will accrue, to the defendant which in equity belong to your orator. And your orator has sustained damages by reason of said violation of his rights, and will sustain further damages if said infringement is continued.

To the end, therefore, that the said defendant may, if he can, show why your orator should not have the relief herein prayed, and may, and according to the best of his knowledge, remembrance, information and belief, but not on oath, answer on oath being expressly waived, full, true, direct and perfect answer make to all and singular the premises, and that he may be decreed to account for, and pay over to your orator all gains and profits realized by him from the unlawful making, using or vending the improvements vested in your orator as aforesaid; and in addition thereto, the damages sustained by your orator by reason of such infringement, to be assessed by or under the direction of your honors; and that your honors may increase the actual damages to three times

the amount of such assessment under the circumstances of the wilful and unjust infringement by said defendant, and that the defendant may be perpetually restrained by an injunction out of this honorable court, from making, using or vending pipes containing the improvement secured as aforesaid to your orator or any material part thereof; and that your orator may have such other or further relief as equity may require.

May it please your honors to grant your orator not only a writ of injunction, conformable to the prayer of this bill, but also a writ of subpoena, directed to the defendant Richard Roe and commanding him at a certain time, under a certain penalty, to appear before your honors, in this court, then and there to answer unto this bill of complaint, and to abide by and perform such decree as the court may make in the premises.

JOHN DOE.

LONG & MOORE, Solicitors for Complainant.
JEREMIAH MASON, of Counsel.

United States of America,
Southern District of New York. } ss.

John Doe, the complainant in the foregoing bill named, being duly sworn, says that he has read the foregoing bill and knows the contents thereof, and that the same is true of his own knowledge, except as to those matters therein stated to be on information and belief, and as to those matters he believes it to be true.

And he further says that he verily believes that John Doe in said bill named is the original, true and first inventor of the new and useful improvement in pipes which is described and claimed in the aforesaid letters patent granted to said John Doe mentioned in the foregoing bill.

And deponent further says that he verily believes that the complainant is the owner of said letters patent, as set forth in said bill.

JOHN DOE.

Subscribed and sworn to before me
this tenth day of December, A. D. 1898.

NORTON PORTER, Notary Public.

FORM NO. 2.¹

BILL TO ENJOIN INFRINGEMENT OF COPYRIGHT.

Circuit Court of the United States, Northern District of New York, in the
Second Circuit.

The West Publishing Company
against
The Lawyers' Co-operative Publishing Com-
pany. }

To the Judges of the Circuit Court of the United States for the Northern District
of New York, in the Second Circuit:

The West Publishing Company, a corporation duly organized under the laws
of the state of Minnesota, having its principal office and place of business at the

¹ Copied from the record in *West Pub. Co. v. Lawyers' Co-operative Pub. Co.*
79 Fed. Rep. 756. For other pleadings in the same case, see Forms Nos. 22, 23,
infra, pp. 1796, 1799.

city of St. Paul, and a resident or citizen of the state of Minnesota, brings this bill against the Lawyers' Co-operative Publishing Company, a corporation duly organized under the laws of the state of New York, having its principal office and place of business at the city of Rochester, in the northern district of New York, and a resident or citizen of said state of New York.

And thereupon your orator complains and says,² that the defendant, the Lawyers' Co-operative Publishing Company, is and for nine years last past has been a corporation duly organized, created and established by and under the laws of the state of New York for the purpose of carrying on the business of making, editing, preparing, publishing and selling books, and that during that time it has carried on and still carries on said business at the city of Rochester, in the state of New York; that your orator is and for ten years last past has been a corporation duly organized, created and established by and under the laws of the state of Minnesota for the same purpose, and that during that time it has carried on and still carries on said business at the city of St. Paul in said state of Minnesota, where it has its principal office and place of business, and that the principal office and place of business of the defendant is located at the city of Rochester in the northern district of the state of New York, and that the defendant as well as your orator is and both of them are residents or citizens of the United States.

And your orator further alleges and shows that since the fifteenth day of September, 1891, it has from time to time, made, edited, prepared and published and thereupon became and was the author and proprietor of a book or work, which had not then been published, entitled, "The Federal Reporter, Vol. 47. Cases Argued and Determined in the Circuit Courts of Appeals and Circuit and District Courts of the United States. Permanent Edition. September-December, 1891," and generally known and labeled on the back as the Federal Reporter, Vol. 47, and, as such author and proprietor, your orator, desiring to secure a copyright upon the same in accordance with the statute of the United States in such case made and provided, before the publication of said book, duly deposited in the mail within the United States, to wit, at the city of St. Paul, Minnesota, addressed to the librarian of Congress at Washington, District of Columbia, a printed copy of the title of said book, and in accordance with the law, on the twentieth day of February, 1892, not later than the day of publication thereof, duly deposited in the mail within the United States, to wit, at the city of St. Paul, Minnesota, addressed to the librarian of Congress at Washington, District of Columbia, two copies of such copyright book; and that such copyright book was printed from plates made from type set within the limits of the United States. And your orator further alleges and shows that from the fifteenth day of September, 1891, until the completion and publication of said book, your orator from time to time made, edited, prepared and published and thereupon became and was the author and proprietor of certain advance sheets or pamphlet books or numbers, containing the decisions of the cases argued and determined in the Circuit Courts of Appeals and Circuit and District Courts of the United States, from September, 1891, to December, 1891, as they were handed down by said courts, which advance sheets or pamphlet books were and are parts of said Federal Reporter, Vol. 47, and are substantially identical with said volume, but were issued from time to time in pamphlet form or numbers for greater convenience and speed in pro-

² Form of address and introduction as above, see Equity Rule 20, *supra*, p. 1670.

mulgating said decisions and were entitled, respectively: "Federal Reporter, Vol. 47, September 22, 1891, No. 1;" (Here followed a similar description of twelve other parts.)

And your orator further alleges and shows that your orator, desiring to secure a copyright upon the first advance book or number so contained in the completed and permanent edition, published prior to the completion of the entire volume and entitled "Federal Reporter, Vol. 47, September 22, 1891, No. 1," in accordance with the statute of the United States in such case made and provided, before the publication of said book or advance number, duly deposited in the mail within the United States, to wit, at the city of St. Paul, Minnesota, addressed to the librarian of Congress at Washington, District of Columbia, a printed copy of the title of said book or advance number, and not later than and upon the day of publication of said book or advance number, deposited in the mail within the United States, to wit, at the city of St. Paul, Minnesota, addressed to the librarian of Congress at Washington, District of Columbia, two copies of said copyright book or advance number, printed from plates made from type set within the limits of the United States. And your orator further alleges and shows that your orator, desiring to secure a copyright upon each of the said remaining or following advanced numbers or books, so published from time to time prior to the completion and publication of the entire volume, in accordance with the statute of the United States in such case made and provided, before the publication of each other or remaining book or advance number, respectively, duly deposited in the mail within the United States, to wit, at the city of St. Paul, Minnesota, addressed to the librarian of Congress at Washington, District of Columbia, a printed copy of the title of said book or advance number, so that the title of each advance book or number was so deposited before the publication of its respective book or number; and respectively not later than and upon the respective and several days of publication of said book or numbers, viz.: 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12 and 13 of said advanced books or numbers, duly deposited in the mails within the United States, to wit, at the city of St. Paul, Minnesota, addressed to the librarian of Congress at Washington, District of Columbia, two copies of said copyright book or advanced numbers, so that not later than the day of publication of each of said books or advance numbers two copies of each thereof were so deposited, each and every of the same having been printed from plates made from type set within the limits of the United States. . . .

And your orator further alleges and shows that since the first day of September, 1891, it has from time to time made, edited, prepared and published and thereupon became and was the author and proprietor of a book or work, which had not then been published, entitled (Here was set out a copy of the title-page), generally known and labeled on the back as "American Digest, 1892, Annual;" and as such author and proprietor your orator, desiring to secure a copyright upon the same, in accordance with the statute of the United States in such case made and provided, before the publication of said book, duly deposited in the mail within the United States, to wit, at the city of St. Paul, Minnesota, addressed to the librarian of Congress at Washington, District of Columbia, a printed copy of the title of said book; and, in accordance with the law, on the second day of November, 1892, not later than the day of publication thereof, duly deposited in the mail within the United States, to wit, at the city of St. Paul, Minnesota, addressed to the librarian of Congress at Washington, Dis-

trict of Columbia, two copies of such copyright book, and that such copyright book was printed from plates made from type set within the limits of the United States.

And your orator further alleges and shows that since August, 1891, it has, from time to time, made, edited, prepared and published and thereupon became and was the author and proprietor of a pamphlet, book or work, which had not then been published, entitled "The American Digest, United States Digest, Third Series (Monthly Advance Sheets), No. 57, September, 1891," and generally known as and called The American Digest Monthly, September, 1891; and as such author and proprietor your orator, desiring to secure a copyright upon the same in accordance with the statute of the United States in such case made and provided, before the publication of said pamphlet book, duly deposited in the mail within the United States, to wit, at the city of St. Paul, Minnesota, addressed to the librarian of Congress at Washington, District of Columbia, a printed copy of the title of said pamphlet book, and, in accordance with the law, not later than the day of publication thereof, duly deposited in the mail within the United States, to wit, at the city of St. Paul, Minnesota, addressed to the librarian of Congress at Washington, District of Columbia, two copies of such copyright pamphlet book, and that such copyright pamphlet book was printed from plates made from type set within the limits of the United States. (Here follow similar allegations as to the monthly advance sheets Nos. 58 to 68 inclusive.)

And your orator further alleges and shows that each and all of said permanent or complete volumes of reports, as well as each and all of said advance numbers or books, embodied in said several volumes, were prepared, arranged and reported by and under the direction of your orator, and each of said volumes and advance numbers or books contained and contains a large amount of matter original with your orator, all of which was and is the private property of your orator as the author and proprietor thereof, and your orator applied for, and as such author and proprietor obtained, the copyrights thereon as aforesaid.

And your orator further alleges and shows that each and every one of said volumes of reports, as well as each and every of said advance numbers or books, embodied in said several volumes, were prepared and reported, as aforesaid, with great labor and expense, in many instances, from the original cases or error-books, containing the processes, pleadings, proceedings, evidence, objectings, rulings, decisions and exceptions, and from the original points or arguments of counsel, and in all cases from the opinions of the courts or judges delivering judgment, copies of which were obtained, at great expense, by your orator, immediately upon their being handed down. That each of said volumes, as well as each of said advance numbers or books embodied therein, contains a great number of the opinions and decisions of the said courts of judicature, and among other additional original matter your orator prepared for each case and decision so reported a syllabus or head-notes, containing a brief statement of the facts and points of law decided thereon, and also, in many of the cases, preliminary statements of the facts on which the decisions were made. That said syllabi or head-notes and preliminary statements of facts were, except where prepared by the court and so designated, wholly original with your orator, and were made, edited, and published, as aforesaid, in said advance numbers as speedily as possible, and in most instances prior to any other publication or report of said cases within the United States. That the syllabi or head-notes to all the cases reported in each permanent or completed volume were also, by your orator, alphabetically arranged according to the subject matter and

reprinted as an index at the end of such volume, with the names of the parties to the cases to which they belonged and a reference to the page where they would be found, thus making for each volume a full and complete digest of the points decided and the cases reported therein, and making said volumes or works convenient and of great value to all persons desiring to use the same.

And your orator further alleges and shows that the American Digest Monthly of your orator was principally composed of and compiled from the syllabi or head-notes made by your orator of the decisions of causes reported in its said reports taken from the advance numbers of books thereof from time to time as prepared, and collected and arranged under their proper subjects and headings, to which they referred in digest form. And that syllabi or head-notes, made, edited and prepared by your orator for its said system of reports and advance numbers, were made, edited and prepared also with a special reference to their fitness and adaptability for use as digest paragraphs in the index digest to each complete volume of reports, and in the monthly or advance digest sheets or pamphlets, and also in the American Annual Digest, or permanent digest for the year. And that the Annual Digest of your orator for 1892 was principally compiled from and composed of the syllabi or head-notes of the cases originally made, edited and prepared for and published in the advance numbers of its permanent editions of its reporters, and which were from time to time reprinted in digest form in the advance numbers or monthly parts of the Digest, from which, and from the advance sheets of the reporters, they were afterward collected and rearranged in permanent form under their appropriate subjects and headings in the Annual Digest as aforesaid.

And your orator further alleges and shows that, by the original work of your orator, and in particular by the original syllabi or head-notes, said volumes of reports and said American Annual Digest, as well as the advanced numbers or books, and said Monthly Digest, became and were convenient and were of great value to all persons desiring to use the same. And your orator further alleges and shows that it has, from time to time, printed and sold a large number of said volumes and the said respective advance numbers or books to its customers and subscribers, amounting to several thousand of each of said volumes, with the advance numbers or books, and also of the American Digest, with its monthly advance numbers or books, and has caused to be printed and inserted in each and all of said copies or volumes, as well in the permanent and complete books or editions as in each and every advance number and book, on the back of the title-page of each and all the complete and permanent volumes or books, and on the title-page of each and all the advance numbers or books, the information and notice of such copyright as required by law; that your orator has never sold or transferred any of said copyrights of said books or works or advance numbers or books, nor any interest or share in the same or in either of them, nor authorized the defendant to publish any of said volumes of reports or any portion thereof, or extracts, excerpts or abridgements thereof; but your orator was and is the sole and exclusive owner of the stock, and the proprietor of all of the said copyrights, and has the sole and exclusive right to publish each and all of the said syllabi and head-notes and preliminary statement of facts contained in said volumes and advance numbers or books, and reprinted in said Annual and Monthly Digests as aforesaid; that your orator had and has the exclusive right to all the contents contained in each and all of said books, volumes or works, and in all of said advance numbers or books, such as the head-notes, head-lines or catch-words, preliminary statements of facts, abstracts of points or arguments of counsel, the

arrangement and division of the cases into volumes, the notes of authorities added to any of the cases as reported, the indices or index-digests in and for each completed or permanent volume of reports, and of all other matter excepting merely the opinions or decisions of the said courts; and the said copyright of the said completed or permanent volumes, together with the said respective advance numbers or books thereof, as well as the said Annual and Monthly Digests, are of great value, to wit, of the value of three hundred thousand dollars, and the loss and damage to your orator by reason of the violations thereof is not less than the same amount.

Nevertheless, as your orator further alleges and shows, the defendant, in its business of publishing and selling law-books, reports and digests, has for several years past and now does publish and sell a volume, annually, known as and called the General Digest, of which it publishes and issues advance sheets and numbers semi-monthly, which said digest and advance numbers is published and sold in competition with the said copyright books and advance numbers or books of your orator, including its Annual and Monthly Digests. That the said defendant, well knowing that the syllabi or head-notes of your orator were made, edited and prepared by your orator with special reference to their adaptability and fitness for use as digest items, and that your orator had been so using and intended so to use the said syllabi or head-notes, did, at different times during the latter portion of the year 1891, and the year 1892, without the consent of your orator, reprint, publish and sell at the cities of Rochester, New York, and elsewhere in the state of New York, and in the said northern district of New York, and all over the United States, and did continuously since and still does publish and expose to sale and sell in large numbers, advance numbers of their General Digest, containing statements of facts, syllabi and headnotes taken, copied and pirated from the said several advance numbers or books thereof of your orator, as well as from the said Annual and Monthly Digests.

And your orator further alleges and shows, on information and belief, that the defendant, in preparing its General Digest for the year 1892, has used and employed principally, as matter therefor, the head-notes or points issued and published in its advance numbers from time to time, which head-notes or points are largely and to a great extent copies of and piracies upon the copyright syllabi, head-notes or points of your orator, made, prepared and edited by your orator and published in its volumes and advance numbers of books, as aforesaid. And your orator further alleges and shows that the defendant has advertised, for some time since, the publication of its General Digest for 1892, and now threatens to and as your orator is informed and verily believes is about to issue, publish and sell the same, so containing infringements upon copies of and piracies of the original copyright matter of your orator, as aforesaid, to the great injury and irreparable damage of your orator in its business, and for which it cannot be compensated by damages in an action at law. That in preparing said General Digest for publication and in preparing the advance numbers thereof, the defendant has substantially copied the head-notes and syllabi, as previously prepared and published by your orator, as aforesaid, resorting to the devices, common in this sort of piracy, of transposing clauses, sentences and paragraphs, using synonyms and making colorable alterations, while always repeating the substance, often using the exact words, and frequently even entire sentences and entire head-notes verbatim from said original works of your orator, and in many instances omitting to correct even the inaccuracies and errors therein, and also in availing

itself of the original work, method and ideas of your orator in making and preparing your orator's head-notes and in digesting the cases, without following the exact language used by your orator, so that thereby, to the great damage of your orator, the defendant was and is enabled to prepare, publish and sell its pirated publications with greater ease and accuracy, and at far less expense; all of which infringements, colorable alterations, copying, piracies and transpositions, will more fully appear upon an examination and comparison of said General Digest and advance numbers thereof with said volumes and advance numbers or books of your orator, which your orator is ready to produce as this honorable court may direct. That the said General Digest, so about to be published, and the advance numbers thereof of the defendant are infringements of and piracies upon the copyrights of your orator, and the said books were made and intended by the defendant to take the place of and as far as possible supersede the said books and advance numbers of your orator, and especially the said Annual and Monthly Digests of your orator, and by means of the various arts and devices aforesaid the defendant has been and is selling large numbers of its said advance sheets of numbers of its Digest to persons who would otherwise have bought or would now buy the said volumes and advance numbers of your orator, and especially its Annual and Monthly Digests for 1892, to its great loss and damage; and the defendant, by means of the art and devices aforesaid, unless restrained by this honorable court, will sell large numbers of their said General Digest for 1892 to persons who would otherwise buy the said Annual Digest of your orator, to its great loss and damage; all of which acts and doings of the defendant are contrary to equity and good conscience, and tend to the manifest wrong and injury of your orator in the premises.

In consideration whereof and forasmuch as your orator is without adequate remedy, save in a court of equity, your orator prays this honorable court to issue its writ of subpoena, in due form of law and according to the course and practice of the court, directed to the said Lawyers' Co-operative Publishing Company, the defendant, as aforesaid, commanding it at a certain day and under a certain penalty to be therein specified to appear before this honorable court to answer all and singular the matters and things hereinbefore set forth and complained of, and especially to answer and set forth:

1. The date of the publication of each of the said advance numbers of said General Digest, issued since August, 1891, by the defendant.
2. The number of copies published of each said advance number.
3. The number of subscribers to said General Digest for the year 1892, and how many said advance numbers of said Digest have been sold and the prices at which they were severally sold.
4. How many orders for said General Digest have been received by the defendant, and at what price per volume.
5. How many of each of said advance numbers of said Digest are still in the possession and under the control of the defendant.
6. How many volumes of said complete General Digest have been made or prepared for publication and sale, or are now being made or prepared therefor or are now in the possession or under the control of the defendant. And to answer all the other matters herein complained of as specifically as if thereto specifically interrogated.

But the said answers to the foregoing interrogatories and to this bill of complaint need not be under oath, an answer under oath being hereby expressly waived.

And your orator prays that the defendant may be restrained by injunction from publishing, selling or exposing for sale, or causing or being in any way concerned in the publishing, selling or exposing for sale, said General Digest for 1892, now threatened to be issued, published and sold by the defendant, or otherwise disposing thereof, and from publishing, selling or exposing for sale, or causing or being in any way concerned in the publishing, selling or exposing for sale, or otherwise disposing of any of said advance numbers of said Digest or copies thereof, hereinbefore complained of, and that all of said books published, as aforesaid, or so about to be published, issued or sold by the defendant, and the stereotype plates thereof be declared forfeited to and for the benefit of your orator, and that the defendant be required to surrender and deliver the same to your orator, and be decreed to render an account of all of said books or numbers published or about to be, and of all that have been sold, and to pay the same, besides the damages suffered from such unlawful publications and the costs of this suit to your orator, and that your orator may have such other and further relief as the nature and circumstances of the case may require and as to this court shall seem just and equitable.

PIERRE E. DU BOIS,
Solicitor for Complainant.
E. COUNTRYMAN,
Of Counsel.

United States of America, } ss.:
District of Minnesota.

Peyton Boyle, being duly sworn, says that he is the vice-president of the corporation complainant above named, and is familiar with its business; that he has read the foregoing bill of complaint and knows the contents thereof; that the same is true to the knowledge of deponent, except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

PEYTON BOYLE.

Subscribed and sworn to before me this twentieth day of December, 1892.

AMBROSE TIGHE,
U. S. Commissioner, District of Minnesota.

FORM NO. 3.*

ANOTHER BILL IN COPYRIGHT CASE.

Circuit Court of the United States for the Southern District of New York.
In Equity.

To the Honorable the Judges of the Circuit Court of the United States for the Southern District of New York, sitting as a Court of Equity:

James T. Black, Francis Black, Adam W. Black and Alexander B. McFlacken, all of the city of Edinburgh, Scotland, and all of whom are subjects of Her

* Copied from the record in *Black v. Henry G. Allen Co.* 42 Fed. Rep. 618. For other pleadings and proceedings in the same case, see Forms Nos. 12, 43, 45, *infra*, pp. 1787, 1819, 1821.

Majesty the Queen of Great Britain and Ireland, and all of whom are aliens, and who are copartners, engaged in business as publishers at the city of Edinburgh under the firm name of Adam & Charles Black, and Francis A. Walker, of the city of Boston, in the county of Suffolk, and state of Massachusetts, and a citizen of said state, and now, and at the time of, and at all times since, the taking of the copyright hereinafter mentioned, a citizen of the United States, bring this their bill of complaint against the Henry G. Allen Company, a corporation organized and existing under and by virtue of the laws of the state of New York, and having its principal place of business at the city of New York, in said state of New York.

And thereupon your orators complain and say as follows, to wit:

The said firm of Adam & Charles Black, your orators aforesaid, are the publishers of a certain work entitled "The Encyclopaedia Britannica, Ninth Edition." The said firm of Adam & Charles Black, at the time of the making of the agreement hereinafter mentioned, consisted of your orators James T. Black, Francis Black and Adam W. Black; and your orator Alexander B. McGlashen became a partner at a later date; and the present firm of Adam & Charles Black now hold and enjoy all the rights of their predecessors in respect of the said "Encyclopaedia Britannica" and the said agreement and the copyright hereinafter mentioned, all the said rights of their predecessors having been vested in them according to law.

Your orators show that the said "Encyclopaedia Britannica" is a well known work, of standard value and character, eight editions of which had been published, and the ninth edition of which was undertaken and has been completed, printed and published at great expense by said Adam & Charles Black. The said ninth edition of the "Encyclopaedia Britannica," so printed and published, is made up of articles or books, each of which is, in a large number of instances, a complete and independent book. None of the articles or books contained in the twenty-third volume of said "Encyclopaedia Britannica," hereinafter referred to, with the exception of the copyrighted book hereinafter referred to, entitled "United States, Part III, Political Geography and Statistics," and two other books or articles, have been copyrighted in the United States.

And your orators further say that heretofore, and before the thirteenth day of February, 1888, your orator, said Francis A. Walker, was then a citizen of the United States and a resident of the city of Boston, in the county of Suffolk, and state of Massachusetts, [and] was the author of a certain book entitled "United States, Part III, Political Geography and Statistics," the copyright of which book was by him, the said Walker, duly secured according to the provisions of the statute of the United States relating to copyrights; that is to say, the said Walker, being the author of the said book entitled "United States, Part III, Political Geography and Statistics," and a citizen of the United States and resident therein, did print and publish the same and did, before the publication thereof, deposit in the mail addressed to the librarian of Congress, Washington, District of Columbia, a printed copy of the title of said work, and did, on the thirteenth day of February, A. D. 1888, deliver at the office of the librarian of Congress at Washington, District of Columbia, a printed copy of the title of said book, and did also, within ten days from the publication of said book, which publication was by him, the said Walker, made in the United States, deposit in the mail addressed to the librarian of Congress at Washington, District of Columbia, and did deliver at the office of the librarian

of Congress at Washington, District of Columbia, two copies of said book, each of which copies so deposited in the mail was a complete printed copy of said book of the best edition issued, and also give notice and information of the copyright thereof having been by him secured by inserting in the several copies of every edition published, on the title-page thereof, the following words, to wit: "Copyright 1888, by Francis A. Walker." And the said Walker duly complied with and fulfilled all the other requirements and provisions of the statutes in such case made and provided, and the librarian of Congress did, on the thirteenth day of February, 1888, record the name of the said book entitled as aforesaid, "United States, Part III, Political Geography and Statistics," and there was granted to the said Walker a copyright for the term of twenty-eight years from the thirteenth day of February, 1888, and the said Walker became entitled to and did acquire the sole liberty of printing, reprinting, publishing, completing, copying, executing and vending the said copyrighted book for the said term of twenty-eight years from the thirteenth day of February, 1888, which copyright still continues and remains in full force and effect.

And your orators further say that your orator, the said Francis A. Walker, having obtained the said copyright in pursuance of law, did, by an agreement made on or about the first day of April, 1888, and before the infringement hereinafter complained of, for a good and valuable consideration, assign and transfer to your orators constituting the firm of Adam & Charles Black an interest in said copyright: that is to say, the said Walker did assign and transfer to your orators constituting the firm of Adam & Charles Black the sole and exclusive right and liberty of printing, reprinting, publishing, copying and vending during the whole term of the said copyright, the said book entitled "United States, Part III, Political Geography and Statistics," in connection with and as a part of their said Encyclopaedia designated "Encyclopaedia Britannica, Ninth Edition," and not otherwise, the said Walker retaining the right to print, publish, copy and vend the said copyrighted book in every form and manner, other than as a part of said "Encyclopaedia Britannica."

And your orators say, that if the said Francis A. Walker did not by the said agreement made on or about the first day of April, 1888, assign and transfer to your orators constituting the firm of Adam & Charles Black, an interest in said copyright, the said agreement was an exclusive and irrevocable license to your orators constituting the firm of Adam & Charles Black, giving and granting them, and by which they acquired, the sole and exclusive right and liberty of printing, reprinting, publishing, copying and vending, during the whole term of said copyright, the said book entitled "United States, Part III, Political Geography and Statistics," in connection with, and as a part of, their said twenty-third volume of their said "Encyclopaedia Britannica, Ninth Edition." And your orators aver that your orators constituting the firm of Adam & Charles Black acquired by the said agreement an equitable interest in said copyright which is substantially the same whether the said agreement was and should be held to be an assignment and transfer of an interest in said copyright or an exclusive license to use the subject of the said copyright as part of said volume of said Encyclopaedia.

And your orators aver that your orators who constitute the firm of Adam & Charles Black have now, and have had since the making of said agreement, an equitable interest in said copyright, and have had the exclusive right of printing, publishing and vending said copyrighted book as part of their said Encyclopaedia,

and that they, your orators who constitute said firm, are greatly and directly injured by the infringements hereinafter complained of, and are equitably entitled to receive the profits which have been diverted from them by the acts of the said The Henry G. Allen Company, hereinafter set forth and complained of, and an account of which is hereinafter prayed for.

And your orators constituting the firm of Adam & Charles Black, after the said copyright had been taken by said Walker, exercised their rights in the premises and made use of said copyrighted book, and printed and sold the same in connection with, and as part of, their twenty-third volume of their said Ninth Edition of the "Encyclopædia Britannica," and continue so to use said copyrighted book; and the right so to use the same is of great value and importance to them.

And your orators say that the whole of said copyright and all the privileges of every nature and description relating thereto, with the exception of the right to use the subject thereof in said Encyclopædia, has always remained and continued to be the property of said Walker. And your orators aver that they are now well seized of said copyright, and are the owners thereof, and that the same is of great value and importance to them, and that they have the right to enjoy all the privileges secured and intended to be secured thereby; and that they now have, and have always had, since said copyright was obtained, copies of said copyrighted book exposed for sale, and that the public have been supplied with the same to their benefit and advantage and the profit of your orators.

And your orators further say that the said The Henry G. Allen Company, intending to injure your orators, and contriving to deprive them of the privileges which they were to receive from the sole and exclusive printing, publishing and vending the said book entitled "United States, Part III, Political Geography and Statistics," has unlawfully, and without the consent of your orators, printed, published and sold, or caused to be printed, published and sold, in said southern district of New York, since your orators' rights in the premises were acquired, as aforesaid, and since the recording of the title of said copyrighted book, a large number of copies of said copyrighted book, or a substantial part or parts thereof, which infringing books so printed, published and sold by said company have been in every way substantially the same as the book which is the subject of your orators' charge, were copied and pirated from your orators' copyrighted book, and the reprinting, publishing and sale of which by said company was a piracy and infringement of your orators' said copyright, and of their rights, and the rights of each and all of them, growing out of said copyright.

And your orators say that the said piratical books so printed in violation of your orators' rights, the said The Henry G. Allen Company has caused to be used in connection with and as part of a so-called "reprint" of the said Encyclopædia Britannica, Ninth Edition, of your orators who constitute the firm of Adam & Charles Black, the same having been printed and used in every way as said copyrighted book had been printed and used by your orators constituting the firm of Adam & Charles Black, in pursuance of their rights in the premises, and as hereinbefore set forth; except that the said The Henry G. Allen Company has omitted the marginal notes of the original and the copyright notice applied upon the title-page of said copyrighted book, to wit: "Copyright 1888, by Francis A. Walker." All of which matters and things acted and done by the said The Henry G. Allen Company are contrary to equity and good conscience, and a great and continuing injury to your orators and to each and all of them,

And the said company has in its possession or power a large number of copies of said infringing books, and threatens to continue and persist in publishing and selling the same in further violation of your orators' rights as aforesaid, and infringement of their said copyright.

And your orators, all and singular, do hereby expressly waive and relinquish any and every right which they may have by reason of the acts of the said The Henry G. Allen Company, hereinbefore complained of, to enforce against or recover of it, the said The Henry G. Allen Company, its successors and assigns, any penalty or penalties, forfeiture or forfeitures, under or by virtue of the statutes of the United States concerning copyrights.

In consideration whereof, and because your orators are remediless in the premises by the rules of the common law, and cannot have adequate relief, save in a court of equity, where matters of this nature are properly cognizable, and to the end that the said The Henry G. Allen Company may answer, all and singular, the matters and things hereinbefore set forth and complained of, and that the said The Henry G. Allen Company be forever restrained by injunction, as well perpetually as during the pendency of this suit, from printing and from publishing and selling or exposing for sale, or otherwise disposing of any copies of its said piratical and unlawful book; and that it may be ordered to render an account of the profits arising from the sale of said piratical book, as far as any profits have been made, and required to pay over such profits to your orators; the profits resulting from the use of said piratical book as a part of said "reprint" being profits to which your orators constituting the firm of Adam & Charles Black are equitably entitled, and the remaining profits growing out of any other infringement of said copyright, if any there be, being profits which, of right, belong to your orator said Francis A. Walker; and to pay to your orators their costs and disbursements in this suit; and that your orators may have such further relief in the premises as to this honorable court may seem meet and equitable, and as the nature and circumstances of the case may require.

May it please your honors such relief fully to direct and order, the same as if the relief which equity demands were made the subject of a specific prayer or prayers; and may it please your honors to grant unto your orators a writ of subpoena according to the course of courts of equity, directed to the said The Henry G. Allen Company, commanding it personally to be and appear before this honorable court, then and there to answer the premises, and to stand to and abide by such order and decree therein as to this honorable court shall seem agreeable to equity and good conscience.

And your orators, as in duty bound, will ever pray, etc.

FRANCIS A. WALKER.

ROWLAND COX,

Solicitor for Complainants.

ROWLAND COX,

Of Counsel for Complainants.

United States of America, District of Massachusetts.

County of Suffolk,

State of Massachusetts.

Francis A. Walker, being duly sworn, says he is one of the complainants named in the foregoing bill of complaint by him subscribed, that he has read the said bill and knows the contents thereof; that as to the statements contained in said

Eq. Prac. Vol. III.—112,

bill which are within his own knowledge, they are true, and as to the statements derived from the information of others, he verily believes them to be true.

FRANCIS A. WALKER.

Subscribed and sworn to before me this twenty-fifth day of October, A. D. 1889.
(Seal)

CHAS. HALL ADAMS,

Commissioner of the State of New York.

Also Notary Public for the County of Suffolk, State of Massachusetts.

FORM NO. 4.⁴

BILL TO ENJOIN INFRINGEMENT OF TRADE-MARK.

[Title of court and cause, address, etc., see Forms Nos. 2, 3, *supra*, pp. 1766, 1773.]

Your orators, John Taylor and William Taylor, of the borough of Leicester, in that part of the kingdom of Great Britain called England; that for many years past they have been extensively engaged in manufacturing sewing cotton thread, at Leicester aforesaid, and vending the same in large quantities, not only in England, but through the United States, and in particular in the city and state of New York. That their thread is, and for many years has been, put up for sale in spools, and labeled on the top of the spool "Taylor's Persian Thread," and on the bottom of the spool "J. & W. Taylor, Leicester;" each spool usually containing two hundred yards or three hundred yards of thread—and the spools containing two hundred yards being black, and labeled "200 yds." on the bottom of the spool—and those containing three hundred yards being red, and labeled "300 yds." on the bottom of the spool—and on the center of the same label, on the bottom of each spool, is stamped the symbol or print of a lion rampant.

Your orators further show unto your honor, that their said thread has been and is manufactured of various sizes and numbers, to meet the wants of the trade; and by means of the care, skill and fidelity with which your orators have conducted the manufacture thereof for a series of years, their said thread has acquired a great reputation with the trade throughout the United States, and large quantities of the same are constantly required from your orators to supply the regular demand for the consumption of the country. And your orators have established agencies for the sale thereof to the wholesale dealers and jobbers in the cities of Boston, New York, Philadelphia and New Orleans; and, in addition thereto, your orators employ Benjamin Warburton, now residing in said city of New York, as their general agent for the United States, in relation to the sale of their said spool sewing cotton thread.

And your orators further show unto your honor, that their said thread is known and distinguished by the trade and the public, as "Taylor's Persian Thread;" and that your orators were the original manufacturers thereof, and the first who introduced the same to the public. That your orators' said general agent, about three weeks since, hearing that complaints were made of the quality

⁴ Copied, except concluding parts, from *Taylor v. Carpenter*, 2 Sandf. Ch. (N. Y.) 604.

of "Taylor's Persian Thread," proceeded to investigate the cause of such complaints, and thereupon ascertained that a spurious article of spool sewing cotton thread was offered for sale by sundry jobbers in the said city of New York as and for your orators' "Persian Thread;" and that such complaints had arisen from the fraudulent imposition of such spurious article upon the public.

Your orators further show unto your honor, that their said agent further ascertained upon inquiry, and your orators charge the facts to be, that the said spurious thread so sold, and offered for sale in the said city of New York, was furnished to the said jobbers by one Daniels Carpenter, of Foxborough, in the state of Massachusetts; that the said Daniels Carpenter, disregarding the rights of your orators, and fraudulently designing to procure the custom and trade of persons who are in the habit of vending and using your orator's said "Persian Thread," and to induce them and the public to believe that the said thread was in fact manufactured by your orators, has engaged extensively in the manufacture of sewing cotton thread, and caused the same to be put up for sale in spools similar to those used by your orators—and so colored, stamped, and labeled as to resemble exactly the said spools used by your orators. And the said spool sewing cotton thread, prepared by the said Daniels Carpenter, and sold by him, and in which he is engaged in selling, as aforesaid, is an exact imitation of the same article which your orators had been manufacturing as aforesaid, and selling in the United States, for many years before the said Daniels Carpenter commenced his said fraudulent imitation thereof. And the said spurious article, although inferior in quality to the genuine Persian thread, manufactured by your orators, can only be distinguished therefrom (so exact is the said Daniels Carpenter's imitation, as aforesaid) by a careful examination of its quality, and by its falling short in the number of yards contained on each spool from the number marked thereon as the contents thereof. And that the general appearance of the spurious article is the same as that of your orators' genuine thread, and well calculated to deceive those dealing in the purchase and sale thereof.

Your orators further show unto your honor, that their said general agent has obtained specimens of the said spurious Persian thread, so sold by the said Daniels Carpenter; that in the specimens thus obtained, the thread is put upon black spools, of the same size and appearance with those used by your orators; on the top of which spurious spools there is pasted a round paper label, partly gilt, on which is printed in a circle the words "Taylor's Persian Thread," and in the center of the circle the number of the thread, and on the other end or bottom of such spurious spools, there is pasted a round white paper label on which is printed in a circle the words "J. & W. Taylor, Leicester," and across the label the words "200 yds." and in the center of the label there is impressed the figure or symbol of a lion rampant. And in all these particulars of the labels on each end of the said spurious spools of thread they are exactly like the labels on the respective ends of the spools of your orators' genuine Persian thread, as hereinbefore stated.

Your orators further show unto your honor, that they have not yet ascertained the extent to which the said Daniels Carpenter has carried his said fraudulent imitation of your orators' said thread. But your orators' said general agent has found the same offered for sale to the trade in three wholesale or jobbing houses in the said city of New York, as "Taylor's Persian Thread." From which your orators believe, and they therefore charge on their belief, that

the said Daniels Carpenter has been and is engaged in selling his said fraudulent and spurious imitation of your orators' Persian thread to a large extent, in various places in the United States—and as your orators are informed and believe, the said Daniels Carpenter is expected daily to arrive in the city of New York, to make further sales of his said imitation of your orators' thread.

Your orators further show unto your honor, that the said fraudulent and inequitable conduct of the said Daniels Carpenter is not only injuring them in the sales of their said genuine Persian thread, and the profits which they would otherwise reasonably make therefrom; but by the inferior quality and false measure of the said spurious Persian thread, is greatly prejudicing the reputation of your orators' said Persian thread in the market; and, unless the said imitation is discontinued or prevented, will ultimately destroy the character and standing of the genuine article.

And your orators also charge that the said spurious article is a fraud and deception upon such of the citizens of New York, and of the United States, as purchase the same believing it to be the genuine article manufactured by your orators.

[To the end, therefore, that the said Daniels Carpenter and his confederates may respectively full, true, direct and perfect answers make, upon their respective corporal oaths, according to the best of their respective knowledge, information and belief, to all and singular the matters and charges aforesaid, and that as fully and particularly in every respect as if the same were here again repeated and they thereunto particularly interrogated]; and that the said Daniels Carpenter and his attorney, solicitors, counselors, agents and servants may be enjoined and restrained from manufacturing, selling or offering for sale, directly or indirectly, any spool cotton sewing thread manufactured by him, or any person [other] than your orators, under the denomination of "Taylor's Persian Thread," or on spools with the words "Taylor's Persian Thread," or, "J. & W. Taylor, Leicester," printed, painted, written or stamped, or attached or pasted thereon; or on spools so made, or having any label, printing, or device thereon, in such manner as to be a colorable imitation of your orators' said Persian thread, usually known as "Taylor's Persian Thread." And that the said Daniels Carpenter may be decreed to account to your orators for all the profits which he has made by the sale of his said fraudulent imitation of your orators' thread, and all the profits which your orators would have made on the sales of their genuine thread, but for the said Daniels Carpenter's inequitable and wanton piracy of their said names, spools and labels.

And that your orators may have such further relief, or may have such other relief, as the nature of the case shall require and shall be agreeable to equity.

May it please your honor to grant unto your orator the writ of subpoena issuing out of and under the seal of this honorable court, to be directed to the said Daniels Carpenter, commanding him, by a certain day, and under a certain penalty therein to be inserted, to be and appear before our chancellor, in our court of chancery, and then and there to answer the premises, and further to stand to and abide such order and decree therein as shall be agreeable to equity and good conscience.

And your orator shall ever pray, etc.

JEREMIAH MASON, solicitor for complainants.

OLIVER ELLSWORTH, of counsel for complainants.

[Verification, see Forms Nos. 2, 3, *supra*, pp. 1766, 1773.]

FORM NO. 2.¹

BILL FOR PARTNERSHIP ACCOUNTING AND FOR RECEIVER.

[Title of court and cause, address, etc., see Form No. 2, *supra*, p. 1766.]

On or about January 1, 1890, your orator and Richard Roe, the defendant hereinafter named, entered into a copartnership together as attorneys and solicitors, your orator engaging to bring into the business the sum of one thousand dollars, and being to receive one-third part or share of the profits, and the said Richard Roe engaging to bring into the business the sum of two thousand dollars, and being to receive two-thirds parts or shares of the said profits.

Your orator further sheweth unto your honors that your orator accordingly brought into the business the said sum of one thousand dollars, and that the said copartnership was carried on and continued until the 1st day of January, 1895, when the same was dissolved by mutual consent, and the usual advertisement of such dissolution was lawfully published.

And your orator further sheweth unto your honors that no settlement of the said copartnership accounts hath ever been made between your orator and the said defendant, and that since the said dissolution your orator hath repeatedly applied to the said defendant to come to a final settlement with respect thereto.

And your orator well hoped that said defendant would have complied with your said orator's reasonable request, as in justice and equity he ought to have done, but the said defendant absolutely refuses so to do.

And your orator charges that the said defendant hath possessed himself of the said copartnership books, and hath refused to permit your orator to inspect the same, and hath also refused to render to your orator any account of the copartnership moneys received by him.

And your orator charges that he has, since the said dissolution, paid the sum of three hundred dollars in respect of the copartnership debts.

And your orator further charges that upon a just and true settlement of the said accounts it will appear that a considerable balance is due from the said defendant to your orator in respect to the said copartnership balances; but, nevertheless, the said defendant is proceeding to collect in the said copartnership debts and apply the same to his own use, which the said defendant is enabled to do by means of the possession of his books of account as aforesaid.

And your orator charges that the said defendant ought to be restrained by injunction by this honorable court from collecting in the said debts; and that some proper person ought to be appointed by this honorable court for that purpose: wherefore your orator prays that an account may be taken of all and every of the said late copartnership dealings and transactions until the time of the expiration thereof; and that the said Richard Roe may be directed to pay to your orator what, if anything, shall upon such account appear to be due from him, your orator being ready and willing, and hereby offering, to pay to the said Richard Roe what, if anything, shall appear to be due to him from said joint concern; and that some proper person may be appointed to receive and collect all moneys which may be coming to the credit of the said late co-

¹ From Barton's Suit in Equity, p. 52.

partnership; and that the said Richard Roe may in the meantime be restrained by an order of injunction from this honorable court from collecting and receiving any debts due and owing thereto.

[Prayer for general relief, and for process, signature and verification, see Form No. 2, *supra*, p. 1766.]

FORM NO. 6.*

CROSS-BILL FOR FORECLOSURE.

In the Circuit Court of the United States for the District of Nebraska.

William D. Galbraith, Cross Complainant,
against

Solomon C. Maple, Phebe A. Maple, H. C. Bigelow, whose first name is Henry, First National Bank of Hebron, Nebraska, A. G. Collins, first name and real name unknown, Henney Buggy Company, a corporation, H. J. Bemis, first and real name unknown, Susie Bemis, Morris A. Bemis, and Leatha M. Bemis, Young, Knode & Co., a partnership and Claramon Hunt, Cross Defendants.

} Cross Bill.

To the Honorable Judges of the Circuit Court of the United States for the District of Nebraska:

William D. Galbraith, cross complainant herein, a citizen of the state of Nebraska, and the same party who is made a defendant to the bill in *Kins Life Insurance Company v. Maple et al.*, exhibits this his cross bill and states as follows:

1. Upon July 17, 1891, the said Solomon C. Maple executed and delivered to the said H. C. Bigelow his certain promissory note in writing whereby said Maple promised to pay said Bigelow on or before Oct. 1, 1893, the sum of seven hundred and fifty dollars with interest thereon at the rate of seven per cent. per annum from July 17, 1897.

2. To secure the payment of the said note and on the same day the said Solomon C. Maple and Phebe Maple his wife, executed and delivered to said H. C. Bigelow a certain mortgage deed and thereby conveyed to said H. C. Bigelow the following real estate situate in Thayer county, Nebraska: (describing realty).

3. Said mortgage was conditioned that if the said Solomon C. Maple or his heirs, executors, administrators or assigns should pay to the said H. C. Bigelow, his executors, administrators or assigns, the sum of seven hundred and fifty dollars on the first day of October, 1893, with annual interest at the rate of seven per cent., principal and interest payable at the Thayer County Bank of

* This cross-bill by a subsequent mortgagee's assignee in a suit for foreclosure is copied from the original papers in the case.

Hebron, Nebraska, and also pay all taxes and other assessments on said land during the continuance of this mortgage before said taxes should become delinquent then said mortgage should be void, otherwise to remain in full force and effect. Said mortgage was further conditioned as follows: (setting out condition).

4. Said mortgage was duly recorded on p. 249 of Mortgage Record 3 in the office of the county clerk of Thayer county, who is also a register of deeds therein, on Sep. 29, 1891, at 11 o'clock A. M.

5. No part of the debt evidenced by said note has ever been paid except the interest thereon to March 15, 1897, and there is now due and unpaid of said debt the principal sum of seven hundred and fifty dollars (\$750) with interest thereon at ten per cent. per annum from March 15, 1897. Said mortgage deed has now become absolute and this cross complainant is entitled to a foreclosure of all equities of redemption in the premises conveyed thereby.

6. Thereafter and long prior to the commencement of this suit the said H. C. Bigelow, for a valuable consideration, indorsed such note as follows: "H. C. Bigelow;" and said note together with said mortgage were duly delivered to this cross complainant, and he is now the holder and owner thereof.

7. No proceedings at law or otherwise have been instituted for the recovery of the debt secured by said mortgage nor has any part thereof been collected save interest as aforesaid; and the amount due thereon constitutes a first and paramount lien on the real estate above described, prior to the lien claimed by the *Ætna Life Insurance Co.* of Hartford, Conn., or to any other claims whatsoever.

8. The cross defendants Solomon C. Maple, Phebe A. Maple, H. C. Bigelow, whose first name is Henry, a citizen of the state of Utah, First National Bank of Hebron, Nebraska, a corporation existing under the laws of the United States, A. G. Collins, first and real name unknown, a citizen of Nebraska, Claramon Hunt, a citizen of the state of Connecticut, Henney Buggy Co., a corporation existing under the laws of the state of Illinois, H. J. Bemis, first and real name unknown, Susie Bemis, Morris A. Bemis, Leatha M. Bemis, the said four last named defendants being citizens of the state of Kansas, Young, Knode & Co., a partnership, organized and doing business in the state of Nebraska, and the *Ætna Life Ins. Co.* of Hartford, Conn., each claims to have some interest in the premises above described, the said Phebe A. Maple and Susie Bemis claiming a dower interest therein, but whatever the sum may be the interest of each of said defendants is inferior, subject and subsequent to the lien of this cross complainant by virtue of said note and mortgage as above set forth.

Wherefore this cross complainant prays, that the cross defendants, each and every of them be required to answer the foregoing cross bill but not upon oath or affirmation, the benefit of which is expressly waived; that the liens of each and every of the said cross defendants upon said mortgaged premises may be decreed to be subject, inferior and junior to that of this cross complainant's mortgage; that said cross defendants may be foreclosed and forever barred of all right, title, claim and equity of redemption in or to said premises or any part thereof; that an account may be taken of the sum due on the said note and mortgage; that the premises conveyed by said mortgage deed may be sold according to law under the order of this court and that the proceeds of said sale be applied first to the amount found due this cross complainant upon said note and mortgage including interest thereon and costs herein, and a reasonable sum as an attorney's fee; that upon confirmation of said sale the purchaser thereat may be put into possession of said premises and to that end may have such process from this court

and that they, your orators who constitute said firm, are greatly and directly injured by the infringements hereinafter complained of, and are equitably entitled to receive the profits which have been diverted from them by the acts of the said The Henry G. Allen Company, hereinafter set forth and complained of, and an account of which is hereinafter prayed for.

And your orators constituting the firm of Adam & Charles Black, after the said copyright had been taken by said Walker, exercised their rights in the premises and made use of said copyrighted book, and printed and sold the same in connection with, and as part of, their twenty-third volume of their said Ninth Edition of the "Encyclopaedia Britannica," and continue so to use said copyrighted book; and the right so to use the same is of great value and importance to them.

And your orators say that the whole of said copyright and all the privileges of every nature and description relating thereto, with the exception of the right to use the subject thereof in said Encyclopaedia, has always remained and continued to be the property of said Walker. And your orators aver that they are now well seized of said copyright, and are the owners thereof, and that the same is of great value and importance to them, and that they have the right to enjoy all the privileges secured and intended to be secured thereby; and that they now have, and have always had, since said copyright was obtained, copies of said copyrighted book exposed for sale, and that the public have been supplied with the same to their benefit and advantage and the profit of your orators.

And your orators further say that the said The Henry G. Allen Company, intending to injure your orators, and contriving to deprive them of the privileges which they were to receive from the sole and exclusive printing, publishing and vending the said book entitled "United States, Part III, Political Geography and Statistics," has unlawfully, and without the consent of your orators, printed, published and sold, or caused to be printed, published and sold, in said southern district of New York, since your orators' rights in the premises were acquired, as aforesaid, and since the recording of the title of said copyrighted book, a large number of copies of said copyrighted book, or a substantial part or parts thereof, which infringing books so printed, published and sold by said company have been in every way substantially the same as the book which is the subject of your orators' charge, were copied and pirated from your orators' copyrighted book, and the reprinting, publishing and sale of which by said company was a piracy and infringement of your orators' said copyright, and of their rights, and the rights of each and all of them, growing out of said copyright.

And your orators say that the said piratical books so printed in violation of your orators' rights, the said The Henry G. Allen Company has caused to be used in connection with and as part of a so-called "reprint" of the said Encyclopaedia Britannica, Ninth Edition, of your orators who constitute the firm of Adam & Charles Black, the same having been printed and used in every way as said copyrighted book had been printed and used by your orators constituting the firm of Adam & Charles Black, in pursuance of their rights in the premises, and as hereinbefore set forth; except that the said The Henry G. Allen Company has omitted the marginal notes of the original and the copyright notice applied upon the title-page of said copyrighted book, to wit: "Copyright 1888, by Francis A. Walker." All of which matters and things acted and done by the said The Henry G. Allen Company are contrary to equity and good conscience, and a great and continuing injury to your orators and to each and all of them,

ceedings and decree now remaining as of record in this honorable court, reference being thereunto had, will more fully appear.

And your orator further sheweth unto your honor that the commission awarded by the said decree never issued, on account of the said Samuel Short going abroad, and being, until lately, out of the jurisdiction of this honorable court; but the said Samuel Short having now returned, and the inconvenience mentioned in your orator's former bill still existing, your orator is desirous of having the said decree forthwith carried into execution, but from the great length of time which has elapsed, and the refusal of the said Richard Roe to concur therein, your orator is advised the same cannot be done without the assistance of this honorable court.

To the end, therefore, that the said Richard Roe may, upon his corporal oath, (interrogatories in usual form); and that the said decree may be directed to be forthwith carried specifically into execution; and the said Richard Roe ordered to do and concur in all necessary acts for that purpose. [Prayer for general relief and for process and signature, see Forms Nos. 2, 3, *supra*, pp. 1766, 1773.]

FORM NO. 8.

PRAECIPE FOR SUBPOENA AD RESPONDENDUM.

....., Esq., Clerk of United States Circuit Court for the Southern District of New York:

You will please issue a subpoena to the defendant, Richard Roe, in the above entitled cause, returnable on the first Monday of January, 1909.

RICHARD T. HIGGINS,
Solicitor for Complainant,
260 Broadway, New York, N. Y.

Dated December 5, 1908.

FORM NO. 9.*

SUBPOENA AD RESPONDENDUM.

United States of America.

In the Circuit Court of the United States, Second Circuit, Southern District of New York.

In Equity.

The President of the United States of America, to Richard Roe, Greeting:

You are hereby commanded that you, Richard Roe, personally appear before the judges of the circuit court of the United States of America for the southern district of New York, in the second circuit court, in equity, on the first Monday of January, A. D. 1909, wherever the said court shall then be, to answer a bill of complaint exhibited against you in the said court by John Doe, and do further and receive what the said court shall have considered in that behalf. And this you are not to omit under the penalty on you of two hundred and fifty dollars.

* See Equity Rule 12, as amended December 17, 1900, 180 IL. S. 641.

Witness, Honorable Melville W. Fuller, chief justice of the Supreme Court of the United States, at the city of New York, on the tenth day of December, in the year one thousand eight hundred and ninety-three, and of the independence of the United States of America the one hundred and seventeenth.

JOHN A. SHIELDS, Clerk.

JONES & SMITH, Complainant's Solicitors,
120 Broadway, New York, N. Y.

You are hereby commanded to enter your appearance in the above suit, on or before the first Monday of January, 1894, at the clerk's office of said Court, pursuant to said bill; otherwise the said bill will be taken *pro confesso*.

JOHN A. SHIELDS, Clerk.

FORM NO. 10.

PRAECIPE FOR APPEARANCE.

[Title of court and cause.]

To the Clerk of the United States Circuit Court for the Southern District of New York:

You will please enter my appearance for the defendant,
in the above-entitled cause.

JAMES P. GLYNN,
Solicitor for Defendant,
165 Broadway, New York, N. Y.

Dated New York, January 10, 1909.

FORM NO. 11.*

EXCEPTIONS TO BILL FOR SCANDAL OR IMPERTINENCE.

[Title of court and cause.]

Exceptions taken by Richard Roe, defendant, to the bill of complaint of John Doe, complainant, filed against him.

First Exception.—For that the allegation in the third line of the third page of the said bill, in the words following, to wit, "then being, and for a long time before having been, a professed friend of your orator," is impertinent and ought to be expunged.

Second Exception.—For that the allegation on the third page after the words "William West," that is to say, "who had patronized him in business and rendered him considerable service by indorsing his notes, and otherwise befriending him," is impertinent and ought to be expunged.

Third Exception.—For that the allegations in the said bill, commencing in the sixth line of the third page thereof with the words following, to wit, "that at

* See Equity Rules 26, 27.

the commencement of the said partnership," and ending at the third line of the fourth page thereof with the words "discounted at the said bank," are scandalous and impertinent and should be expunged.

In all which particulars the said defendant humbly insists that the complainant's said bill of complaint is irrelevant, impertinent and scandalous.

Wherefore, the said defendant excepts thereto, and humbly prays that the impertinence and scandal of the said bill of complaint excepted to as aforesaid may be expunged, with costs.

OLIVER ELLSWORTH,
Counsel for Defendant.¹⁰

FORM NO. 12.¹¹

AFFIDAVIT AND CERTIFICATE TO DEMURRER.

State of New York,
Southern District of New York, } ss.
City and County of New York. }

Henry G. Allen, being duly sworn, deposes and says: I am president of the Henry G. Allen Company, a corporation, and which is the defendant in the above entitled suit, and I further depose and say that the above demurrer is not interposed for delay.

HENRY G. ALLEN.

Subscribed and sworn to before me this 19th day of March, A. D. 1890.

ALBERT C. AUBERY, Notary Public, Kings Co.

Certificate filed in N. Y. Co.

I,, hereby certify that I am the solicitor and of counsel for the Henry G. Allen Company, a corporation, the defendant above named, and that in my opinion the demurrer of the said Henry G. Allen Company interposed to the bill of complaint of, the complainant in the above cause, is well founded in point of law, and proper to be filed in the above cause.

.....
Solicitor and of Counsel for Defendant.

FORM NO. 13.¹²

DEMURRER FOR MULTIFARIOUSNESS.

[Title of court and cause, see Forms Nos. 2, 3, *supra*, pp. 1766, 1773.]

[The demurrer of defendant, to the bill of complaint of complainant:

The defendant, by protestation not confessing nor acknowledging all or any of the matters and things in the said bill of complaint contained to be true in such

¹⁰ Exceptions must be "signed by counsel." Equity Rule 27.

¹¹ Copied from the record in *Black v. Henry G. Allen Co.* 42 Fed. Rep. 618. For other pleadings and proceedings in the same case, see Form No. 3, *supra*, p. 1773, Forms Nos. 43, 45, *infra*, pp. 1818, 1821. Necessity of affidavit and certificate, see Equity Rule 31, *supra*, p. 1674.

¹² Copied from *Hayes v. Dayton*, 8 Fed. Rep. 703.

manner and form as the same are therein and thereby set forth and alleged, demurs to the said bill, and for cause of demurrer shows:] that it appears by the said bill that it is exhibited against this defendant for several and distinct matters and causes, in many whereof, as appears by said bill, the defendant is not in any manner interested or concerned, and which said several matters and causes are distinct and separate one from the other, and are not alleged in said bill to be conjointly infringed by said defendant. By reason of the distinct matters therein contained the complainant's bill is drawn out to considerable length, and the defendant is compelled to take a copy of the whole thereof, and by joining distinct matters together, which do not depend upon each other, in the said bill, the pleadings, orders and proceedings will, in the progress of the said suit, be intricate and prolix, and the defendant be put to unnecessary charges in taking copies of the same.

Wherefore and for divers other good causes of demurrer appearing in the said bill, the defendant demurs thereto, and demands the judgment of this honorable court whether he shall be compelled to make any further or other answer to the said bill; and prays to be hence dismissed with his costs and charges in this behalf most wrongfully sustained.

[..... Solicitor and counsel for defendant.]

Add affidavit and certificate as in Form No. 12, *supra*, p. 1787.

FORM NO. 14.¹³

ANOTHER DEMURRER FOR MULTIFARIOUSNESS.

[Title and commencement, see Form No. 13, *supra*, p. 1787.]

That it appears by the said bill that the same is exhibited by the complainant Isaac N. Jenness, and the several other persons therein named as complainants thereto, for distinct matters and causes, in several whereof, as appears by the said bill, the said complainants are not in any manner in common or jointly interested or concerned, and that the bill is multifarious, and that the said complainants have not, in and by their said bill, made or stated such a case as entitles them in a court of equity to any relief from or against this defendant touching the matters contained in said bill, or any of such matters.

Wherefore (concluding as in Form No. 13, *supra*, p. 1787.)

[Signature of Solicitor.]

Add affidavit and certificate as in Form No. 12, *supra*, p. 1787.

FORM NO. 15.¹⁴

DEMURRER FOR DEFENDANTS WANT OF INTEREST IN SUBJECT-MATTER.

[Title and commencement, see Form No. 13, *supra*, p. 1787.]

That the scope and end of the complainant's bill is to be relieved touching several sums of money by the said bill supposed to be due from these defendants

¹³ Copied from *Jenness v. Smith*, 64 Mich. 91.

¹⁴ From 2 Harr. Ch. Pr. p. 415.

to one Edward Frost, deceased, in the said bill named, which the complainants would, or seek by their said bill to claim as executors to the said Edward Frost, and yet have not alleged in or by their said bill, that they have proved the will of the said Edward Frost, if any such was made, or otherwise taken upon them the burden or execution thereof, or anyways entitled themselves unto his personal estate, and to sue for the same. Wherefore, and forasmuch, as the said complainants have not well and sufficiently entitled themselves in and by their said bill to the said moneys, if they had been due from these defendants or either of them, to the said Edward Frost, as is thereby supposed, and for that, should these defendants pay the money demanded by the said bill to the complainants before they have either proved the will or sued out administration, they cannot sufficiently, as these defendants are advised and insist, discharge these defendants, nor give these defendants any proper receipt or receipts for the same, but that they shall or may be liable to be questioned again by such person as may sue out administration to the said Edward Frost with the said will annexed, or otherwise. Wherefore (continuing and concluding as in Form No. 13, *supra*, p. 1787.)

[Signature of Solicitor.]

Add affidavit and certificate as in Form No. 12, *supra*, p. 1787.

FORM NO. 16.¹⁵

DEMURRER FOR DEFENDANTS WANT OF INTEREST IN SUBJECT-MATTER.

[Title and commencement, see Form No. 13, *supra*, p. 1787.]

For that the said complainant hath not, by his said bill, which seeks to set aside the award therein set forth, and to which this defendant is made a party in his character of an arbitrator, shown that he can have any decree against this defendant, whose answer could not be read as evidence against the other defendants to the said bill, or any of them; and the said complainant, for anything that appears in the said bill to the contrary, might examine this defendant as a witness in this suit. Wherefore (continuing and concluding as in Form No. 13, *supra*, p. 1787.)

[Signature of Solicitor.]

Add affidavit and certificate as in Form No. 12, *supra*, p. 1787.

FORM NO. 17.¹⁶

DEMURRER SPECIFYING SEVERAL GROUNDS.

[Title and commencement, see Form No. 13, *supra*, p. 1787.]

"1. That it appears by said bill that the same is exhibited against this defendant, and the several other persons therein named as defendants thereto,

¹⁵ From Curt. Eq. Prac. p. 147,

¹⁶ Copied from *Dunston v. Hoptonic Co.*, 83 Mich. 381,

for distinct matters and causes, in several whereof, as appears by the said bill, this defendant is not in any manner interested or concerned, and that the said bill is altogether multifarious.

"2. That it doth not appear by said bill that all the solvent stockholders of said Hoptonic Company who are within the jurisdiction of this court are made parties thereto.

"3. That it doth appear by said complainant's bill that there are stockholders in said Hoptonic Company other than those made parties to this suit, and it doth not appear from said bill that such stockholders are insolvent or beyond the jurisdiction of this court, nor doth it in any manner sufficiently appear therefrom why such other stockholders are not made parties to said bill; yet the said complainant hath not made them parties thereto.

"4. That it doth appear by said complainant's bill that Walter S. Hicks and Charles F. Cobb, residents of the State of Michigan, and within the jurisdiction of this court, were stockholders of said Hoptonic Company, and it doth not in any manner sufficiently appear from said bill why the said Walter S. Hicks and Charles F. Cobb are not made parties to said bill; yet the said complainant hath not made them parties thereto.

"5. That the said complainant hath not in and by his said bill made or stated such a cause as doth or ought to entitle him to any such discovery or relief as is thereby sought and prayed for from or against this defendant."

Wherefore (continuing and concluding as in Form No. 13, *supra*, p. 1787.)

[Signature of Solicitor.]

Add affidavit and certificate as in Form No. 12, *supra*, p. 1787.

FORM NO. 13.¹⁷

ANOTHER DEMURRER SPECIFYING SEVERAL GROUNDS.

[Title and commencement, see Form No. 13, *supra*, p. 1787.]

- (1.) The allegations of said bill are too uncertain, vague and indefinite.
- (2.) The bill does not set out with sufficient certainty the claim of complainant in the subject-matter of the suit.
- (3.) The bill does not sufficiently set out title of complainant in the subject-matter of suit.
- (4.) The bill does not set out with sufficient certainty to what portion of the stream mentioned, or bed thereof, complainant's claim extends.
- (5.) Complainant does not allege that said stream or portions thereof, from which phosphate is alleged to be taken, or on account of which relief or discovery is sought, is within tide-water.

Wherefore (continuing and concluding as in Form No. 13, *supra*, p. 1787.)

[Signature of Solicitor.]

Add affidavit and certificate as in Form No. 12, *supra*, p. 1787.

¹⁷ Copied from State v. Black River P. Co., 27 Fla. 320,

FORM NO. 19.¹²

PLEA IN ABATEMENT ON GROUND OF ANOTHER SUIT PENDING.

In the Circuit Court of the United States, for the District of Nebraska.

The Rhode Island Hospital Trust Company, a corporation, and Ross R. Mattis, Trustee, complainants,
against

William J. Hanna, Nellie M. Hanna, Charles Van Duyn, Lydia A. Van Duyn, E. W. Van Duyn, full Christian name unknown, The Lincoln Savings Bank and Safe Deposit Company, a corporation, John E. Hill, as Receiver of the Lincoln Savings Bank and Safe Deposit Company, David Bradley & Company, a corporation, The State Bank of Belvidere, Nebraska, a corporation, J. W. Maple, full Christian name unknown, The Thayer County Bank, a corporation, Charles E. Baker, J. W. Lamm, full Christian name unknown, A. G. Collins, full Christian name unknown, Defendants.

In Chancery.

Plea in abatement of the Lincoln Savings Bank and Safe Deposit Company, a corporation, and John E. Hill as receiver thereof to the bill of complaint of the Rhode Island Hospital Trust Company, a corporation, and Ross R. Mattis, trustee.

To the Honorable Judges of the Circuit Court of the United States, for the District of Nebraska:

1. These defendants respectively, by protestation, not confessing or acknowledging all or any of the matters and things in the said complainant's bill of complaint mentioned and contained to be true, in such sort, manner and form as the same are therein set forth and alleged, for plea to the whole of said bill, and to the jurisdiction of this court and for the matter in abatement of this suit allege:

2. That on the twenty-second day of January, 1896, John E. Hill was by the District Court of Lancaster county, Nebraska, duly and legally appointed the receiver of the Lincoln Savings Bank and Safe Deposit Company, and did proceed to qualify and has been ever since and is now acting as such, he being the defendant John E. Hill, as receiver of the Lincoln Savings Bank and Safe Deposit Company.

3. That on April 20th, 1895, the defendant Charles R. Van Duyn and one J. Z. Biscoe, being indebted to the Lincoln Savings Bank and Safe Deposit Company

¹² Plea by a second mortgagee and its receiver to a bill for foreclosure, Copied from the original papers in the case.

in the sum of two thousand eight hundred and seventy dollars, did make, execute and deliver to the said Lincoln Savings Bank and Safe Deposit Company their certain promissory note in words and figures following, to wit: (setting out note verbatim).

4. That on the 31st day of January, 1896, the defendant Charles R. Van Duyn did make, execute and deliver to the Lincoln Savings Bank and Safe Deposit Company his certain promissory note for the sum of two hundred and fifty dollars, in words and figures following (setting out note verbatim).

5. The above described promissory notes were given for an indebtedness from the said parties to the said the Lincoln Savings Bank and Safe Deposit Company, and contracted prior to the seventh day of May, 1894, and defendant says that on the seventh day of May, 1894, [for] the purpose of securing the indebtedness evidenced by the above described promissory note the defendant Charles R. Van Duyn, who was then seized in fee of the premises hereinafter described, did, together with the defendant Lydia A. Van Duyn, his wife, make, execute and deliver to the said the Lincoln Savings Bank and Safe Deposit Company their certain warranty deed in words and figures following, to wit: (setting out deed verbatim).

6. Said deed was filed for record in the office of the county clerk of Thayer county, Nebraska, January 24th, 1896, and recorded in book 4 of deeds on page 553.

7. Subsequently the said the Lincoln Savings Bank and Safe Deposit Company did take up and pay off two interest coupons secured by a certain mortgage of four thousand dollars on said premises; said interest coupons were taken up and paid off in pursuance of the agreement between the said Lincoln Savings Bank and Safe Deposit Company and the defendants Charles R. Van Duyn and Lydia A. Van Duyn to the effect that said deed shall be held by it as security therefor, and said interest coupons were in words and figures following, to wit: (setting out interest coupons verbatim).

8. No part of the indebtedness above mentioned has yet been paid, excepting the sum of one hundred and fifty-one dollars and seventy-five cents, which was paid on the sixth day of May, 1896, and there is now due thereon to these defendants the sum of three thousand four hundred and eighteen dollars and eighty cents with interest on the sum of three thousand and eighteen dollars and eighty cents at the rate of ten per cent. per annum from the sixth day of May, 1896, and interest at the rate of ten per cent. per annum on the sum of two hundred and fifty dollars from the thirty-first day of January, 1896, and interest at the rate of ten per cent. per annum on the sum of one hundred and twenty dollars from the first day of April, 1896, and interest at the rate of ten per cent. per annum on the sum of thirty dollars from the first day of April, 1896.

9. That on the seventh day of November, 1896, this defendant John E. Hill, as receiver of the Lincoln Savings Bank and Safe Deposit Company, commenced an action in the District Court of Thayer county, Nebraska, in which his codefendants herein were defendants and in which action he sought for the foreclosure of his said lien upon the property in controversy in this suit. In said suit the defendant and cross-complainant herein, Charles E. Baker, was a defendant, summons was duly issued and served upon the resident defendants therein long prior to the commencement of this suit and on or about the eighth day of November, 1896, a summons was issued therein directed to the sheriff of Gage county, Nebraska, for the defendant Charles E. Baker, which said summons was not

served, and again on the twenty-eighth day of July, 1897, an alias summons was issued therein for defendant Charles E. Baker which was served on the twenty-ninth day of July, 1897, and these defendants allege that said foreclosure proceeding in said District Court of Thayer county, Nebraska, is still pending and undetermined in said court; that the property in controversy herein is in *custodia legis* and in the hands of said District Court, and at the commencement of this action said District Court of Thayer county, Nebraska, had full jurisdiction of said action and of the rights of these answering defendants and of the said Charles E. Baker in and to the property in controversy in this suit, and had charge, custody and control of said property and jurisdiction thereof; that the issues tendered in the petition of the plaintiff in that court with respect to the interests of the said Charles E. Baker are contradictory to the interests of the said Baker as tendered in his cross bill in this court. And these defendants further allege that if the relief prayed for in that petition be granted to the plaintiff thereon and the relief prayed for in the bill of the complainants herein and cross bill of the defendant Charles E. Baker herein should all be granted, there would then be a conflict in the relief so granted in this court with the relief granted in the District Court of Thayer county, Nebraska, and a conflict of jurisdiction, all of which is made more definite by the production of a certified copy of the petition, summons and the service thereon in said cause, pending in the District Court of Thayer county, Nebraska, which are tendered in court upon the hearing of this plea.

All of which matters and things these defendants doth aver to be true and plead the said facts to the said complainants' bill, and pray the judgment of this honorable court whether they ought to be required to make any other or further answer to the said bill, and most wrongfully sustained, or that this action may be held in abeyance until after the termination of the jurisdiction of the District Court of Thayer county, Nebraska, in, over and to the property in controversy in this suit.

JOHN E. HILL, Receiver
of the Lincoln Savings Bank and Safe Deposit Company.
By A. S. TIBBETS and L. C. BURR, their [Counsel].

The State of Nebraska, }
Lancaster County. } ss.

John E. Hill, as receiver of the Lincoln Savings Bank and Safe Deposit Company, a corporation, makes solemn oath and says that he is one of the defendants; that the foregoing plea is not interposed for delay and that the same is true in point of fact.¹³

JOHN E. HILL, Receiver.

Subscribed in my presence and sworn to before me this thirty-first day of July, A. D. 1897.

W. E. BAKERLY, JR., Notary Public.

A. S. Tibbets, and L. C. Burr, attorneys for the answering defendants the Lincoln Savings Bank and Safe Deposit Company and John E. Hill, as receiver

¹³ Necessity of affidavit to plea, see Equity Rule 31, *supra*, p. 1674.
Eq. Prac. Vol. III.—113,

of the Lincoln Saving, Bank and Safe Deposit Company, do hereby certify that in my opinion the foregoing plea is well founded in point of law.²⁰

A. S. TIBBETS, and L. C. BURR [Counsel for receiver].

FORM NO. 20.²¹

PLEA TO BILL TO CARRY DECREE INTO EXECUTION.

[Title of court and cause, see Form No. 19, *supra*, p. 1791.]

The plea of Richard Roe, defendant, to the bill of complaint of John Doe, complainant. This defendant (or these defendants respectively) by protestation not confessing or acknowledging all or any of the matters and things in the said complainant's bill of complaint mentioned and contained to be true, in such sort, manner and form as the same are therein set forth and alleged, for plea to the whole of the said bill (or to so much and such part of said bill as prays, setting out prayer, or seeks a discovery from this defendant whether, setting out the matter as in the prayer), says that he is advised that the complainant by his bill claims to be entitled to divers lands in his said bill mentioned, for the term of his life, by virtue of the last will and testament of John Doe, in the said bill mentioned, to bear date the tenth day of June, 1844, and prays that he may have the benefit of a certain decree of this honorable court, made in a cause wherein the said John Doe was complainant and this defendant was defendant, and that such decree may be carried into execution; to which bill this defendant doth plead, and for plea saith, that the will of the said John Doe, in the complainant's bill mentioned, was not duly executed and attested so as to pass real estates, and therefore the lands therein, and in the said complainant's said bill mentioned, descended to John Smith, of (stating place), as the heir-at-law of the said John Doe; wherefore this defendant is advised that the complainant is not entitled to have the benefit of the decree, or to have the same carried into execution; and this defendant demands the judgment of this honorable court, whether he shall be compelled to make any further or other answer to the said bill, or any of the matters and things therein contained, and prays to be hence dismissed, with his reasonable costs in this behalf sustained.

JEREMIAH MASON, Solicitor for Defendant.

ANDREW JACKSON, of Counsel.

[Add affidavit and certificate as in Form No. 19, *supra*, p. 1791.]

FORM NO. 21.²²

DISCLAIMER.

[Title of court and cause, see Form No. 19, *supra*, p. 1791.]

The several answer and disclaimer of Richard Roe, one of the defendants, to the bill of complaint of John Doe and Samuel Short, complainants.

This defendant, saving and reserving to himself now and at all times hereafter, all manner of advantage and benefit of exception that may be had and taken to

²⁰ Necessity of certificate of counsel, see Equity Rule 31, *supra*, p. 1674.

²¹ From 3 Barb. Ch. Pr., 2d ed., p. 237, No. 316. Bill to carry decree into execution, see Form No. 7, *supra*, p. 1784.

²² From 2 Harr. Ch. Pr. 401.

the many untruths, uncertainties, insufficiencies and imperfections in the said complainants' said bill of complaint contained for a full and perfect answer thereunto, or to such part thereof as it materially concerns this defendant to make answer unto, he answereth and saith, That he believes that Leonard A. Ford did die seized of such estates in and as in the said complainants' said bill are mentioned; and this defendant does believe that the said Leonard A. Ford did make such last will and testament in writing and did thereby create such trusts out of the said estates, and appointed this defendant trustee thereof, in such manner and to such purport and effect as in the said complainant's said bill for that purpose set forth; and this defendant does believe that the said testator made Charles Mainjoy, gent., executor of his said will; and this defendant does believe that the said Leonard A. Ford, soon after making his said will, departed this life, that is to say, on or about the tenth day of May in the year 1812, without revoking or altering his said will, seized of such estates in and as in the said complainant's said bill are set forth: And this defendant further saith, that he was advised that the said trust would be attended with some difficulty, besides expense and loss of time to this defendant; therefore this defendant absolutely refused to intermeddle therewith, or any way concern himself therein: And this defendant denies that he, or any for him, ever entered on the said trust estate, or ever received any of the rents and profits thereof; but this defendant hath been informed and believes the same were received by Thomas Hart, of the city of Leeds, in the county of York, gent., who was employed by the said testator Leonard A. Ford in his life-time to receive the rents and profits of the said estate for the said Leonard A. Ford, and this defendant doth believe that the said Thomas Hart hath received the said rents and profits of the said trust-estate ever since the death of the said testator Leonard A. Ford, and still doth continue to receive the same: And this defendant positively denies that the said Thomas Hart had any power, authority or direction from this defendant to receive all or any part of the rents and profits of the said trust-estate, or that he ever accounted with this defendant for the same: And this defendant is very desirous and ready to be discharged from his said trust, and to do any act for that purpose as this honorable court shall direct, this defendant being indemnified in so doing, and having his costs. And this defendant further saith, that as to so much of the said bill as seeks a discovery of this defendant's title to the lands in this defendant saith, that he doth not know that he this defendant to his knowledge or belief ever had, nor did he claim or pretend to have, nor doth he now claim or pretend to have, any right, title or interest of, in or to the said estate in in the said complainants' bill set forth, or any part thereof; and this defendant doth disclaim all right, title and interest to the estate in in the complainants' said bill mentioned and every part thereof. And this defendant doth deny all manner of unlawful combination and confederacy unjustly charged against him in and by the said complainants' said bill of complaint;²³ without that, that any other matter or thing in the said complainants' said bill of complaint contained, material or necessary for this defendant to make answer unto, and not herein or hereby well and sufficiently answered unto, confessed or avoided, tra-

²³ If the complainant's bill does not contain the common confederacy clause (see Equity Rule 21, *ante*, p. 1670) the denial thereof in the disclaimer should of course be omitted.

versed or denied, is true: All which matters and things this defendant is ready to aver, maintain and prove, as this honorable court shall award; and humbly prays to be hence dismissed with his reasonable costs and charges in this behalf most wrongfully sustained.

[Signature of counsel and of the defendant.] 24

FORM NO. 22.²⁵

ANSWER DENYING INFRINGEMENT OF COPYRIGHT.

United States Circuit Court, Northern District of New York.

West Publishing Company	}
vs.	
Lawyers' Co-operative Publishing Company.	

The defendant, for answer to the bill of complaint exhibited herein, says: It admits that the plaintiff is a corporation organized under the laws of the state of Minnesota, and having its principal office and place of business at the city of St. Paul in said state, and that the plaintiff has carried on and still carries on its business at the city of St. Paul, aforesaid; and that the defendant is a corporation organized under the laws of the state of New York for the purposes alleged in said bill of complaint, and has carried on and still carries on its business at the city of Rochester in said state; and that the business so carried on by the said defendant and the said plaintiff is correctly stated in said bill of complaint.

Said defendant, further answering, admits that the plaintiff has published the various books or works alleged to have been published by it in said bill of complaint, and that the same were printed from plates made from type set within the limits of the United States, but whether said plaintiff has taken the various steps to secure a copyright upon or for said works, or whether said defendant has acquired a copyright therein, or in any of the same, as stated in said bill of complaint, this defendant has no knowledge or information sufficient to form a belief, and, therefore, leaves the plaintiff to its proof.

Said defendant admits that each and all of said permanent or complete volumes of reports, as well as each and all of said advance numbers or books embodied in said volumes, were prepared, arranged and reported under the direction of the plaintiff, and that each and all of said advance numbers, volumes, or books contained matter original with the plaintiff, but whether the amount of the original matter contained in said volumes, advance numbers or books is large or otherwise, or whether the same is a private property of the plaintiff as author or proprietor, and whether the plaintiff has obtained copyrights thereon, as alleged in said bill of complaint, this defendant has no knowledge or information sufficient to form a belief.

²⁴ A disclaimer should be signed by counsel and by the defendant.

²⁵ Copied from the record in *West Pub. Co. v. Lawyers' Co-operative Pub. Co.* 79 Fed. Rep. 756. For other pleadings and proceedings in the same case see Form No. 2, *supra*, p. 1766, and Form No. 23, *infra*, p. 1799.

Said defendant further says that it has no knowledge or information sufficient to form a belief as to the way in which said reports, numbers, or books were prepared and reported, or at what labor and expense, and, therefore, leaves the plaintiff to its proof. The said defendant admits that the syllabi and head-notes, and preliminary statements of facts, except where prepared by the court, were original with said plaintiff, and were made, edited and published as stated in said bill of complaint, and that the syllabi or head-notes of cases reported in each permanent or completed volume were by the plaintiff alphabetically arranged, and reprinted as an index at the end of such volume, as is alleged in said bill of complaint.

Said defendant further admits that the American Digest Monthly of said plaintiff, and the Annual Digest of said plaintiff for the year 1892, were principally compiled from and composed of the syllabi or head-notes of the cases originally prepared for and published in the advance numbers of its permanent edition of its reporters, and which were from time to time reprinted in the advance numbers or monthly parts of its digest; but whether the said syllabi or head-notes, made, edited or prepared by the plaintiff for its system of reports and advance numbers, were made, edited and prepared with special reference for use as digest paragraphs in the index digests to each complete volume of reports and in the monthly or advance digest sheets or pamphlets, and also in the American Annual Digest, or permanent digest for each year, this defendant has no knowledge or information sufficient to form a belief.

Said defendant admits that the said American Annual Digest, and said advance numbers of said Monthly Digest, became and were convenient and were of value to all persons desiring to use the same, but whether of great value or what value, this defendant has no knowledge or information sufficient to form a belief.

The defendant admits that the plaintiff has from time to time printed and sold a large number of said volumes and of said advance numbers, and of its American Annual Digest and of its monthly advance numbers or books, but whether to the amount of several thousands of each of said volumes, or to what amount, this defendant has no knowledge or information sufficient to form a belief.

It admits that the plaintiff has caused to be printed and inserted in its copies or volumes, and in the permanent and completed books or editions, and in each advance number or book, and in each of the complete and permanent volumes or books, notice that the same were copyrighted, as required by law, as alleged in said bill of complaint. Whether the plaintiff has ever sold or transferred any of said copyrights this defendant has no knowledge or information sufficient to form a belief.

It admits that the plaintiff has never authorized this defendant to publish any of said volumes of reports, or the syllabi or head-notes thereof, or extracts, excerpts or abridgments thereof, except such right as was conferred upon the defendant and upon the public at large to make use of such publication, by reason of the publication thereof. The defendant has no knowledge or information sufficient to form a belief as to whether the plaintiff is the exclusive owner and proprietor of all the said copyrights, or whether it has the sole and exclusive right in each and all of the syllabi, head-notes and preliminary statements of facts contained in said volumes, in advance numbers or books, and reprinted in said Annual or Monthly Digests, as aforesaid; or whether it has the exclusive right to the head-notes, head-lines or catch-words, preliminary statements of facts, abstracts of arguments of counsel, arrangements and division of the cases into volumes, notes of authori-

ties added to any of the cases reported, indices or index digests in and for each complete volume of reports, and of all matter, excepting the opinions and decisions of said courts, or any of the matters in said bill of complaint stated.

The defendant denies that the value of said advance numbers, books, annual digests and monthly digests, mentioned in the said bill of complaint, is \$300,000, or any like sum, or that the loss or damage to the plaintiff by the violation of any of its rights mentioned or alleged in said bill of complaint is of that or any similar amount; but as to what is the value of said books, advance numbers and digests, this defendant has no knowledge or information sufficient to form a belief, and it denies that the plaintiff has sustained any loss or damage by reason of violation of any of its rights alleged in said bill of complaint.

This defendant admits that in its business of publishing and selling law-books, reports and digests, it does and has for several years past published and sold annually a volume known and called the General Digest, of which it publishes and issues advance sheets semi-monthly, and that said digest and advance sheets or numbers are published and sold in competition with the advance numbers or books of the plaintiff, including its annual or monthly digest.

Said defendant, further answering said bill of complaint, says, that it denies each and every allegation in said bill of complaint charging this defendant with using or intending to use the syllabi or head-notes of the plaintiff, or any of them, or reprinting, publishing or selling in large numbers, or any numbers, in advance numbers of its General Digest, or otherwise, statements of facts, syllabi or head-notes, taken, copied, or pirated from the volumes of reports of the plaintiff, or from the advance numbers or books thereof, or from its annual or monthly digest, or that it has used or employed, principally or at all, in preparing its General Digest for 1892, the head-notes or points issued and published by the plaintiff, or that said head-notes or points issued and published by the defendant are largely, or at all, copies of and piracies upon the head-notes or points of the plaintiff, made, prepared and edited by it, and published in its volumes, advance numbers or books, as charged in said bill of complaint.

The said defendant denies that, in preparing its General Digest for publication, and the advance numbers thereof, it has substantially, or at all, copied the head-notes and syllabi previously prepared and published by the plaintiff, or that it has resorted to any of the devices in reference thereto charged in said bill of complaint, or that it has availed itself of the original work, method and ideas of the plaintiff, in making and preparing its head-notes, or in digesting cases, as charged in said bill of complaint; and it denies that any of its publications are pirated from, either wholly or in part, the publications of the said plaintiff.

The defendant denies that its General Digest for 1892, or the advance numbers thereof, are infringements of or piracies upon the copyrights, if any, of the plaintiff.

The defendant admits that its publications were made and intended to take the place of, and, as far as possible in legitimate business competition, supersede the books and advance numbers of the plaintiff; but it denies that it has resorted to any of the arts or devices to secure the object inconsistent with legitimate business competition, and it denies, upon information and belief, that it has been and is selling large numbers of its advance sheets or numbers of its digests to persons who would otherwise have bought the volumes and advance numbers of the plaintiff, or its annual or monthly digest for 1892; and it denies that the plaintiff has sustained loss and damage by any act of this defendant; and it denies that

it has or will sell large, or any, numbers of its General Digest for 1892 to persons who would otherwise buy the Annual Digest of the plaintiff, to its loss or damage, which sales were procured, or will be procured, by means of any of the wrongful or illegal arts or devices charged in said bill of complaint; and it denies that it has done any act contrary to equity and good conscience, and which tends to the wrong and injury of the plaintiff.

The defendant denies each and every allegation in said bill of complaint not hereinbefore specifically answered unto, and prays that it may be hence dismissed, with costs.

LAWYERS' CO-OPERATIVE PUBLISHING CO.,

By JAMES E. BRIGGS.

COGSWELL, BENTLEY & COGSWELL,

Defendant's Solicitors.

WILLIAM F. COGSWELL,

Of Counsel.

FORM NO. 23.*

REPLICATION.

Circuit Court of the United States, Northern District of New York.

The West Publishing Company, complainant,

ant,

vs.

The Lawyers' Co-operative Publishing Company, defendant.

In Equity.

The replication of the West Publishing Company, complainant, to the answer of the Lawyers' Co-operative Publishing Company, defendant.

This replicant saving and reserving unto itself now and at all times hereafter all and all manner of benefit and advantage of exception which may be had or taken to the manifold insufficiencies of the said answer, for replication thereunto says that it will aver, maintain and prove its said bill of complaint to be true, certain and sufficient in law to be answered unto, and that the said answer of the said defendant is uncertain, untrue and insufficient to be replied unto by this replicant. Without this that any other matter or things whatsoever in the said answer contained, material or effectual in the law to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed or avoided, traversed or denied is true. All which matters and things this replicant is and will be ready to aver, maintain and prove as this honorable court shall direct, and humbly prays as in and by its bill it has already prayed.

PIERRE E. DU BOIS,

Solicitor for Complainant.

* Copied from the record in West Pub. Co. v. Lawyers' Co-operative Pub. Co. 79 Fed. Rep. 756. For other pleadings in the same case see Forms Nos. 2, 22, *supra*, pp. 1766, 1796.

FORM NO. 24.²⁷

ORDER SUSTAINING DEMURRER.

In the Circuit Court of the United States for the District of Nebraska.

Rhode Island Hospital Trust Company, et	}	Order.
al., complainants,		
against		
William J. Hanna and Nellie M. Hanna et		
al., defendants and respondents.		

This cause came on for hearing at the present term upon the demurrer of the defendant William J. Hanna and the demurrer of the defendant Nellie M. Hanna to the bill of complaint herein, the same being argued and submitted by counsel; upon consideration whereof, it appearing to the court that said bill of complaint states no cause of action against either of said defendants, the court doth sustain said demurrers.

It is therefore considered and adjudged by the court that the prayer of the demurrers of the said defendants be granted; that the defendant William J. Hanna be hence dismissed without a day and recover his costs, taxed at (stating amount), and that the defendant Nellie M. Hanna be hence dismissed without a day and recover her costs, taxed at (stating amount).

W. H. MUNGER, Judge.

Omaha, Nebraska, April 9, 1898.

FORM NO. 25.²⁸

ORDER SUSTAINING DEMURRER AND DISMISSING BILL.

In the Circuit Court of the United States for the Eastern District of Texas.

Minnie M. Appleton et al., complainants,	}	Decree.
against		
James H. Smelser et al., defendants.		

This cause coming on to be heard upon the defendants' demurrer to plaintiffs' bill, and after hearing arguments of counsel and duly considering said demurrer, the court is of the opinion that the demurrer should be sustained. It is therefore ordered, adjudged and decreed by the court that the defendants' demurrer to plaintiffs' bill be in all things sustained, that plaintiffs' bill filed in this cause be dismissed, that the defendants recover their costs, and that the plaintiffs be adjudged to pay all costs incurred in this cause, for which let this execution issue.

DAVID E. BRYANT, Judge.

²⁷ Copied from the original papers in the case.

²⁸ Copied from *Appleton v. Smelser*, 60 Fed. Rep. 138.

FORM NO. 26.²⁹

ORDER OVERRULING DEMURRER.

[Title of court and cause, see Form No. 24, *supra*, p. 1800.]

The demurrer of the said defendants to the bill of complaint of said complainant having been brought on for argument before said court, and after hearing Messrs. O. T. Tuthill and Howard & Ross, solicitors for complainant, in opposition thereto, and Messrs. Edwards & Stewart, solicitors for defendants, and Messrs. Osborn & Mills, of counsel for defendants, in support of said demurrer, and after due consideration of the same, it is ordered by the court that the same be and is hereby overruled, with costs to be taxed.

[Ordered this the 17th day of January, 1909.

(Signed) Judge.]

FORM NO. 27.³⁰

RESTRAINING ORDER ENJOINING LABORERS AND LABOR ORGANIZATIONS.

James Sloan, Jr., complainant,	}
vs.	
Eugene V. Debs et al., defendants.	

On this, the 4th day of August, 1897, the complainant in this action, by A. B. Fleming, his counsel, presented to the undersigned, one of the judges of the Circuit Court of the United States for the District of West Virginia, his bill of complaint alleging, among other things, that the defendant, in conjunction with other defendants in the bill named, were conspiring together to interfere with the operating and conducting of the coal mines operated by the Monongah Coal and Coke Company, and by such interference preventing the employees of the Monongah Coal and Coke Company from mining and producing coal in and from the said mines; and that unless the court granted an immediate restraining order preventing them from interfering with the employees of the owners of said mines, there was great danger of irremediable injury, damage, and loss to the owners of said mines.

Upon consideration whereof the bill is ordered to be filed and process issued thereon, and a temporary restraining order is allowed, restraining and inhibiting the defendants and all others associated or connected with them from in any wise interfering with the management, operation, or conducting of said mines by their owners or those operating them, either by menaces, threats, or any character of intimidation used to prevent the employees of said mines from going to or from said mines, or from engaging in the business of mining in said mines.

²⁹ Copied from *Shaw v. Chase*, 77 Mich. 438.

³⁰ This was the decree of Judge Jackson in the case of *Sloan v. Debs* (the Monongah Coal and Coke Company case) in the United States Circuit Court for the District of West Virginia, in 1897.

And the defendants are further restrained from entering upon the property of the owners of the said Monongah Coal and Coke Company for the purpose of interfering with the employees of said company, either by intimidation or the holding of either public or private assemblages upon said property, or in any wise molesting, interfering with or intimidating the employees of the said Monongah Coal and Coke Company so as to induce them to abandon their work in said mines.

And the defendants are further restrained from assembling in the paths, approaches, and roads upon said property leading to and from their homes and residences to the mines, along which the employees of the Monongah Coal and Coke Company are compelled to travel to get to them, or in any way interfering with the employees of said company in passing to and from their work, either by threats, menaces, or intimidation; and the defendants are further restrained from entering the said mines and interfering with the employees in their mining operations within said mines, or assembling upon said property at or near the entrance of said mines.

The purpose and object of this restraining order is to prevent all unlawful combinations and conspiracies and to restrain all the defendants engaged in the promotion of such unlawful combinations and conspiracies from entering upon the property of the Monongah Coal and Coke Company described in this order, and from in any wise interfering with the employees of said company in their mining operation, either within the mines or in passing from their homes to the mines and upon their return to their homes, and from unlawfully inciting persons who are engaged in working the mines from ceasing to work in the mines, or in any wise advising such acts as may result in violations and destruction of the rights of the plaintiff in this property.

The motion for a permanent injunction is set down for hearing at the United States Court room at Wheeling on the 20th day of September, 1897.

This injunction is not to take effect until the plaintiff, or some responsible person for him, shall enter into bond in the sum of \$5,000, conditioned to pay all such costs and damages that will accrue to the defendants by reason of the plaintiff suing out this injunction.

[Signature.]

FORM NO. 28.²¹

AFFIDAVIT FOR PRELIMINARY INJUNCTION IN COPYRIGHT CASE.

United States of America, District of Massachusetts.

On this sixth day of February, A. D. 1896, before me personally appeared David M. Ladd, who, being by me duly sworn, deposes and says that he is one of the complainants in the above entitled action; that he has during the past seven years had personal supervision and direction of the compiling, preparation, revision and transcribing of the manuscript copy of each of the several editions of the "United Mercantile Agency Credit Ratings for the Marble, Granite and Stone Trade;" that during that period his firm has continually had as subscribers, with

²¹ Copied from Ladd v. Oxnard, 75 Fed. Rep. 705.

one or two exceptions, all the leading manufacturers, quarriers, and wholesalers of marble and granite as used for both monumental and building purposes; that his firm and its representatives and agents have repeatedly consulted said subscribers with the aim and purpose in view of securing items of experience that would be of assistance in the revision and correction of said several editions of said Credit Ratings, and that from personal experience he has found it a matter of impossibility and impracticability to secure from said individual subscribers or members of the wholesale trade, information, corrections, or changes or reliability or value to aid him in connection with the revision of said work, except as may have related to the particular customers or patrons of such individuals, or concerns, which would necessarily and naturally be of limited number and a very small minority of all the firms and parties engaged in the various lines in the several states as included in said work. Said deponent further says that he had personal charge and supervision of the first edition of said Credit Ratings, issued in June, 1890, and that neither the compilation of that nor any of the several editions of the same work issued since that date have been or were compiled or revised from town to city directories or trade lists, but that the information and matter contained in said books were secured through special correspondents, agents and representatives in all sections of the United States, and Canada, and from direct correspondence with the retail dealers in marble, granite and stone in the various towns and cities of the entire country; that the original answers to such direct correspondence with dealers, and the revised lists as sent in annually by said representatives, agents and special correspondents, are now on file in the office of said complainants, and, in consequence, that if any instances occur where errors and misprints appear in both complainants' and respondents' books it cannot be explained or excused on the ground that both used the same common sources of information, unless it can be shown that complainants' agents and representatives and special correspondents also acted in the same capacity for said respondents. The deponent further says that he has made a careful comparison between the work issued by his firm in June, 1894, and the respondents' book, and that he finds that clerical errors and misspellings of his own making from the printed cards and letter headings, and pen signatures of various dealers, are reproduced in said respondents' book without change; that the names of the parties who were never engaged in the marble, granite or stone line, but whose names were inserted in Credit Ratings as detectives (or, in other words, for the purpose of enabling said complainants to discover infringements, should any be attempted), are also reproduced in the book of said respondents; that the names of towns correctly inserted in every standard atlas and gazetteer, but misspelled through error by said complainants in their books, also appear with like misspelling in the book of said respondents; that names wrongfully classified under towns of the same name in different states also appear reproduced without correction in said respondents' book, some of which are shown in the lists or tables herewith appearing, and further shown by the several letters and communications on file herewith, marked Exhibits A 1 to Z, inclusive, and numbers 1 to 15, inclusive. The deponent further says that over ten thousand corrections and changes were made on the 1894 edition of Credit Ratings, as revised and issued in June, 1895, while said Blue Book, issued by respondents, in November, 1895, is almost identical with the June 1894 edition of Credit Ratings, issued seventeen months previously by the complainants, except that a few corrections were made in Pennsylvania, and one or two other states. The deponent further says that on

the states of Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, District of Columbia, and Georgia the substance of the 1894 book of Credit Ratings is reproduced in the Blue Book, with only five or six alterations and one addition: while in the 1895 edition of Credit Ratings, issued seven months in advance of the Blue Book, several hundred changes, additions, and discontinuances were made in the same states. The deponent further says that no edition of the Credit Ratings issued to date has contained less than eight thousand changes from the book of the previous year, and that no two editions of Credit Ratings, published in different years, bear such close resemblance or show such uniformity in composition and make-up as do the Blue Book of the respondents and the 1894 Credit Ratings issued by complainants. The deponent further says that each year since 1889 he has personally devoted two-thirds of his entire time, working long hours and frequently evenings in the revision of this work, constantly employing, during that period, three assistants in writing and mailing correspondence and lists for revision. The said deponent further says that, in such comparison of said Blue Book with said Credit Ratings of 1894 as he has been able to make (which has been thorough in the above mentioned states), he finds the similarities given in said lists or tables hereinafter appearing, as to the states of Alabama, Arizona, Arkansas and California, and says that the same similarity appears as to the states of Colorado, Connecticut, Delaware and Georgia; and from his examination of other states the deponent believes that a further specification would be simply to recopy both of said books, except that some changes appear in the states of Pennsylvania and Massachusetts. In the said list or table hereinafter appearing, the deponent has in some instances added, after the word "Note," a few words in explanation, and that the word "Note" and explanation following should not be taken as appearing in either of said books. And the deponent further says that the following are the letters, characters and numerals and their respective significations, as appearing in the said Blue Book and said Credit Ratings: (Here follows a list setting out the similarities in the publications of plaintiff and defendant).

Ending with Wyoming, respondents follow complainants' classification in making up the Canadian provinces, which is not alphabetical as in other publications, but a style original with, and peculiar to, complainants.

DAVID M. LADD.

Sworn to February 6, 1896.

FORM NO. 29.¹¹

INJUNCTION BOND.

Know all men by these presents that we, Meyers & Levi, Meyer Weill, Michael Frank, and Samuel Friedlander, are held and firmly bound, jointly and severally, unto Solomon Isaacs in the sum of five thousand dollars, lawful money of the United States of America, to be paid to the said Solomon [Isaacs, his executors, administrators or assigns, for which payment well and truly to be made we bind

¹¹ Copied from Myers v. Block, 120 U. S. 206.

ourselves, our heirs, executors and administrators firmly by these presents. Sealed with our seals.]

Dated 19th February, 1874.

Whereas the said Meyers & Levi, Meyer Weill, and Michael Frank have presented a petition to the honorable the District Court of the United States for the District of Louisiana, praying for a writ of injunction against the said Solomon Isaacs: Now, the condition of the above obligation is, that we, the above bounden Meyers & Levi, Meyer Weill, and Michael Frank, and ———, will well and truly pay to the said Solomon Isaacs, the defendant in said injunction, all such damages as he may recover against us in case it should be decided that the said writ of injunction was wrongfully issued.

MEYER WEILL.	(Seal)
M. FRANK.	(Seal)
LEHMAN, GODCHAUX & CO.	(Seal)
MEYERS & LEVI.	(Seal)
SAMUEL FRIEDLANDER.	(Seal)

FORM NO. 30.²³

ORDER FOR PRELIMINARY INJUNCTION.

And now, at this day, to wit, at a Circuit Court of the United States for the Eastern District of Virginia, held at Richmond, in said district, this 8th day of October, A. D. 1887.

J. P. Cooper and others against Morton Marye, Auditor, etc., and Others.	} In Equity.
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This cause came on this day to be heard upon the motion of the complainants for a preliminary injunction and was argued by counsel; upon consideration where if it is adjudged, ordered and decreed,²⁴ for reasons stated in writing and made part of the record, that the injunction be issued as prayed in the bill and remain in force until the further order of the court.

HUGH L. BOND,
Circuit Judge.

FORM NO. 31.²⁵

ORDER FOR PRELIMINARY INJUNCTION AGAINST PICKETING, ETC.

[Title of court and cause, etc., see Form No. 30, *supra*.]

This cause came on to be heard upon the plaintiff's motion for a temporary injunction; and after due hearing, at which the several defendants were repre-

²³ Copied from *In re Ayers*, 123 U. S. 455.

²⁴ The beginning of orders and decrees is prescribed in Equity Rule 86, *supra*, p. 1692.

²⁵ Copied from *Vegelahn v. Guntner*, 167 Mass. 94.

sented by counsel, it is ordered, adjudged and decreed that an injunction issue *pendente lite* to remain in force until the further order of this court, or of some justice thereof, restraining the respondents and each and every of them, their agents and servants, from interfering with the plaintiff's business by patronizing the sidewalk or street in front or in the vicinity of the premises occupied by him, for the purpose of preventing any person or persons who now are or may hereafter be in his employment, or desirous of entering the same, from entering it, or continuing in it; or by obstructing or interfering with such persons, or any others, in entering or leaving the plaintiff's said premises; or by intimidating, by threats or otherwise, any person or persons, who now are or may hereafter be in the employment of the plaintiff, or desirous of entering the same, from entering it, or continuing in it; or by any scheme or conspiracy among themselves or with others, organized for the purpose of annoying, hindering, interfering with, or preventing any person or persons who now are or may hereafter be in the employment of the plaintiff, or desirous of entering the same, from entering it, or from continuing therein.

[Signature, see Form No. 30, *supra*, p. 1805.]

FORM NO. 32.^a

ORDER FOR PRELIMINARY INJUNCTION AND APPOINTMENT OF RECEIVER.

Virginia.

In vacation. Before Hon. D. W. Bolen, Judge of the Fifteenth Judicial Circuit, Sitting During the Indisposition of Hon. John A. Kelly, Judge of the Sixteenth Judicial Circuit.

Jonas Wilder and als., complainants,	}	In Chancery.
v.		
Virginia, Tennessee & Carolina Steel and Iron Company, defendants.		

Upon presentation and reading of the bill of complaint, verified by the affidavits of Jonas Wilder, Wm. G. Sheen, John M. Bailey and A. H. Blanchard, the exhibits therewith filed, and the affidavits of John R. Dickey, J. F. Hicks, Jonas Wilder, W. G. Sheen, A. J. Wilcox, J. H. Fleenor, J. L. Burson, F. N. Hash, W. F. Aldrich, A. A. Hobson, V. Keebler, M. J. Drake, John H. Dishner, F. W. Aldrich, John M. Bailey, (Nos. 1, 2, 3, and 4,) J. H. Winston, Jr., and upon motion of complainant for an order for an injunction and the appointment of a receiver upon consideration of all which it is adjudged and ordered that upon the complainants, or some one of them, executing bond with good security before the clerk of the circuit court of Washington county, in the penalty of \$500.00, conditioned according to law, for the payment of all such damages as may be incurred, and all such costs as may be awarded in case this injunction shall be dissolved, an injunction is awarded, according to the prayer of the bill, to be directed unto the Virginia, Tennessee and Carolina Steel and Iron Com-

^a Copied from Central Trust Co. v. South Atlantic etc. R. Co. 57 Fed. Rep. 6.

pany, its officers, agents and employees, restraining it and them, and each of them, from collecting any money due it; from selling, mortgaging, removing, interfering with, or in any way disposing of, its property, or creating or incurring any liabilities upon the property of said company. And said injunction also to be directed to the defendants F. W. Huidekoper, John H. Inman, A. H. Bronson, George S. Scott, Nathaniel Thayer, H. C. Fahnestock, George Blogden, W. G. Oakman, N. Baxter, Jr., A. M. Shook, F. D. Carley, E. A. Adams, R. A. Ayers, C. L. James, J. C. Haskell, William P. Clyde, Exstine Norton, restraining them, and each of them, from acting or assuming to act as directors of said Virginia, Tennessee and Carolina Steel and Iron Company, and from in any way transacting business in the name of, or in behalf of, the company, and from any interfering with any of the property of the company; also, restraining them from releasing or attempting to release any subscriber to the capital stock of said company from any liability on account of such subscription to the capital stock of said company. And said injunction also to be directed to the Bailey Construction Company, Bristol Land Company, and the South Atlantic and Ohio Railway Company, their agents, officers, or employees, and each and all of them, restraining them, and each of them, from collecting any money, incurring any liabilities, or in any way interfering with the property or business of the South Atlantic and Ohio Railway Company, Bailey Construction Company, Bristol Land Company, until the further order of court or judge in vacation. And as incident to the injunction, and for the purpose of preserving the property affected thereby, and for the purpose of protecting the rights and interests of all parties in interest, it is ordered and decreed that, upon the injunction herein allowed, being perfected, that John M. Bailey be and he is hereby appointed a receiver in this case, and as such receiver will take charge and possession of the property and assets of the Virginia, Tennessee and Carolina Steel and Iron Company, and of the Bailey Construction Company, of the South Atlantic and Ohio Railroad Company, and of the Bristol Land Company, and manage, operate, and control the same, and collect all money due to either of said corporations; and said receiver shall, in the management and operation of said railroad company, employ and appoint all necessary officers, agents and employees, and make and enforce all necessary rules and regulations, and shall keep all necessary and proper accounts of expenses and disbursements in managing and operating said railroad. Said receiver shall, every two weeks, render an account of the disbursements and expenditures, and of his transactions as receiver, which account is to be filed in this cause; and he shall commence, and, as soon as can be done, complete, and file in this cause, an inventory of all property taken possession of by him as such receiver. But before acting as such receiver, the said John M. Bailey shall execute bond, with good security, before the clerk of said circuit court of Washington county, in the penalty of \$10,000, conditioned for the faithful discharge of his duties as such receiver according to law, and according to this order. This order appointing a receiver to remain in force until further order of court or judge in vacation.

D. W. BOLEN,

Judge of the 15th Judicial Circuit of Va.

Enter this order. To clerk circuit court of Washington county.

D. W. BOLEN,

Judge of the 15th Judicial Circuit of Va.

August 6, 1890.

FORM NO. 33.*

MASTER'S REPORT OF FORECLOSURE SALE.

United States of America, }
District of Nebraska. } ss.

In the Circuit Court of the United States for the District of Nebraska.

The Northwestern Mutual Life Insurance Company

No. 139 "R."

vs.

In Equity.

William T. Seaman et al.

Report of Sale.

To the Judges of the Circuit Court of the United States, for the District of Nebraska, in equity sitting:

In pursuance and by virtue of a decretal order of said court, made in the above entitled cause and bearing date from the ninth day of December, 1895, by which it was, among other things, ordered, adjudged, and decreed, that all and singular the said mortgaged premises mentioned in the bill of complaint in this cause, and hereinafter described, or so much thereof as might be sufficient to raise the amount reported due to the complainant, as therein mentioned, for the principal and interest and the costs in this case, and which might be sold separately without material injury to the persons interested, to be sold at public auction, by or under direction of one of the masters in chancery of said court, at any time after the twenty-ninth day of December, 1895; provided that request for stay of order of sale, as provided by the statutes of Nebraska, was not made within that time; that the said sale be made at the east door of the Douglas county court-house in the city of Omaha, state of Nebraska; that the said master give public notice of the time and place of such sale according to the course and practice of said court, and that the complainant or any of the parties in this case might become the purchaser; that the said master execute a deed or deeds to the purchaser or purchasers of the said mortgaged premises on the said sale; and that the said master, out of the proceeds of the said sale pay the costs of this suit, and pay to said complainant or its solicitor the amount so reported due as aforesaid, together with interest thereon at the rate of seven per cent. per annum from the date of said report, or so much thereof as the purchase money of the mortgaged premises would pay of the same; and that the said master take receipts for the amounts so paid, and file the same with this report; and that he bring the surplus moneys arising from said sale, if any there should be, into court without delay, to abide the further order of the court; and it is further ordered and decreed that if the moneys arising from said sale should be insufficient to pay the amount so reported due to the complainant, with interest and costs and expenses of said sale as aforesaid, that said master specify the amount of such deficiency in his report of said sale.

I, the undersigned, E. S. Dundy, Jr., one of the masters in chancery of said court, do respectfully certify and report, that having been charged by the solicitor for the complainant with the execution of the said decretal order, I advertised said premises to be sold by me at public auction, to the highest bidder, at the

* Copied from the original papers in the case.

west door of the Douglas county court-house in the city of Omaha, state of Nebraska, on the twentieth day of March, 1897, at ten o'clock in the forenoon of that day; that previous to said sale I called an inquest of two disinterested freeholders, residents of the district of Nebraska, and duly appraised the interest of the said defendant, in the mortgaged premises herein, at its real value in money, in accordance with the statutes of the state of Nebraska, in such case provided, which said appraisement is hereto attached and made a part of this my report: and that previous to said sale I caused notice thereof to be publicly advertised thirty days before said sale, by causing notice of such sale to be printed and published in the Omaha Weekly Bee, one of the newspapers designated by the rules of the court in which legal advertisements should be made, which notice contained a brief description of the said mortgaged premises; a copy of which said published notice with the proper affidavit of publication thereof is annexed and made part of this my report.

And I do further report that on the said twentieth day of March, 1897, the day on which the said premises were so advertised to be sold as aforesaid, I attended at the time and place fixed for said sale and exposed said premises for sale at public auction, to the highest bidder; and the said premises were then and there fairly struck off to the Northwestern Mutual Life Insurance Company for the sum of twenty-one thousand three hundred and thirty-four (\$21,334.00) dollars, it being the highest bidder therefor, and that being the highest sum bidden therefor.

And I do further certify and report, that said mortgaged premises did not sell for a sum sufficient to satisfy said decree, interest and costs, together with the costs and expenses of said sale, but there remains a balance due to said complainant under said decree after said sale, amounting to the sum of three hundred forty-five and 64-100 (\$45.64) dollars, as appears by "schedule A" hereto annexed.

And I further certify and report, that the premises so sold as aforesaid were described in said decretal order as follows, viz.: (describing realty).

(Schedule A was here set out in full.)

E. S. DUNDY, Jr.,
Master in Chancery of the Circuit Court of the United
States for the District of Nebraska.

FORM NO. 34.²⁸

RULE TO SHOW CAUSE AGAINST CONFIRMATION OF FORECLOSURE SALE.

The Northwestern Mutual Life Insurance Company	} Rule to Show Cause.
against 139 "R."	
William T. Seaman et al.	

On motion of the complainant, by Howard Kennedy, Jr., solicitor, it is ordered by the court that said defendants be and they are hereby ruled to show cause, if any they have, by January twenty-eighth next, why the sale made by the master in chancery under the decree herein shall not be ratified and confirmed.

W. D. McHUGH, Judge.

²⁸ This rule was copied from the record in the case.
Eq. Prac. Vol. III.—114.

FORM NO. 35.³⁹

NOTICE OF RULE TO SHOW CAUSE AGAINST CONFIRMATION OF FORECLOSURE SALE.

In the Circuit Court of the United States for the District of Nebraska.

The Northwestern Mutual Life Insurance Company,	}	Notice.
Complainant,		
against		
William I. Seaman, Sarah M. Seaman and Wm. H. Slocum, Defendants:		

To the above named defendants:

You and each of you will take notice that on January 26th, 1897, the Hon. W. D. McHugh, United States District Judge, made an order herein requiring you to show cause by January 28th, 1897, if any there be, why the sale made herein January 25th, 1897, and the master's report of the same, should not be ratified and confirmed.

HOWARD KENNEDY, Jr.,

Solicitor for Complainant.

We hereby acknowledge service of a copy of the foregoing notice this 27th day of January, 1897.

BARTLETT, BALDRIDGE & DE FORD,
Solicitors for Defendants Seaman.
MEIKLE & GAINES,
Solicitors for Defendant Slocum.

FORM NO. 36.⁴⁰

EXCEPTIONS TO MASTER'S REPORT OF FORECLOSURE SALE.

In the Circuit Court of the United States within and for the District of Nebraska.

The Northwestern Mutual Life Insurance	}	Exceptions to Master's
Company, complainant,		
against		
Frederick Mauss et al., defendants.		

Exceptions of the defendant Frederick Mauss to the Master's report of sale of the property in controversy in this action, to wit: lot 123 in Nelson's addition to Omaha, according to the plat thereon recorded in book 6, page 434 of the Deed Records of Douglas county, Nebraska.

The defendant Frederick Mauss excepts to the said master's report of sale and to the said master's doing under said decree for that the above described property

³⁹ Copied from the record in the case.

⁴⁰ Copied from the record in the case.

was appraised for said sale too low and was appraised so low that said appraisement constitutes in law and in fact a fraud upon the rights of this defendant.

The defendant Mauss further excepts to the said report for that the said J. B. Parrott and Charles E. Miller were not and are not disinterested freeholders as the law requires.

Said defendant further excepts to said report that the said E. S. Dundy, Jr., does not certify in the appraisement attached to and a part of said report that the said J. B. Parrott and Charles E. Miller are disinterested freeholders in and residents of said Douglas county.

This defendant further excepts to said report for the reason that in the appraisement attached to and being a part of said report there is deducted from the gross valuation of said property taxes without any warrant of law therefor, and without any legal certificate showing that said taxes are lawfully due and unpaid.

LYSLE I. ABBOTT,
Solicitor for Defendant.

FORM NO. 37.^a

ORDER AND DECREE CONFIRMING REPORT OF FORECLOSURE SALE.

[Title, etc., see Form No. 30, *supra*, p. 1805.]

This cause coming on to be heard upon the report of sale of E. S. Dundy, Jr., Esq., one of the masters of this court, which report was filed on the twenty-fourth day of March, 1897, and upon motion of the defendant William T. Seaman to set aside the appraisement made under the order of sale issued herein February 10th, 1897, and upon the exceptions taken to the said report of sale upon the part of defendant William T. Seaman, and upon the motion of the said defendant William T. Seaman to set aside said sale, and also upon the motion of the complainant to confirm said report of sale and said sale, and the said cause having been argued by counsel and due deliberation had thereon, and the court, on careful examination of the proceedings of said master, being satisfied that the same have been had in all respects in conformity with the law and with the order of the court, it is by the court ordered that the motions of the defendant William T. Seaman, to set aside said appraisement and to set aside sale and the exceptions taken to the said report of sale on the part of defendant William T. Seaman, be and the same are hereby overruled; and it is by the court ordered that the said report of sale and also the said sale be and the same are hereby approved, ratified and confirmed; and it is further ordered that the said E. S. Dundy, Jr., as master in chancery, convey to the purchaser at said sale, by deed in fee simple, the lands and tenements so sold, and a writ of possession is awarded to put said purchaser in possession of said premises; to which rulings and orders of the court the said defendant William T. Seaman excepts.

It is further ordered that said defendant William T. Seaman have thirty days within which to prepare and serve a bill of exceptions.

W. D. McHUGH, Judge.

^a Copied from the original papers in the case.

FORM NO. 38.⁴¹

ANOTHER DECREE CONFIRMING FORECLOSURE SALE.

[Title of court and cause, etc., see Form No. 30, *supra*, p. 1805.]

Decree confirming sale, and ordering conveyance and possession.

It appearing to the court by the report of Joseph W. Burke, special commissioner to make the sale of the above-stated railway, that he did, on the 14th day of February, 1895, at Gadsden, in Etowah county, state of Alabama, expose for sale the said Chattanooga Southern Railway, with all its rights, properties, appurtenances, and franchises, and that the same was purchased by the reorganization committee of said railway, as the purchasing committee, to wit, H. A. V. Post (chairman), Russell Sage, Thomas H. Hubbard, Henry L. Lamb, and Newman Erb, at and for the price of four hundred thousand dollars, subject, however, as recited in said decree under which said sale was made, to certain preferential liens and claims, and to all and singular the terms and conditions in said decree set forth; and it further appearing that said purchasers have made the payment of fifty thousand dollars, in cash, to said Joseph W. Burke, special commissioner as provided in said decree; and it being shown to the satisfaction of the court that the statements in the report of said special commissioner of the sale of said property are true, and no objections being made to the confirmation of said report: It is therefore considered, ordered, and decreed by the court, on motion of counsel for complainant, Central Trust Company of New York, that the said report of said special commissioner be, and the same is, in all respects confirmed, and the sale made by him on said 14th day of February, 1895, to said H. A. V. Post (chairman), Russell Sage, Thomas H. Hubbard, Henry L. Lamb, and Newman Erb, the purchasing committee, as joint tenants, and not tenants in common, of all and singular the railway, equipment, property, and franchises of the Chattanooga Southern Railway Company, as described in and by the decree of foreclosure entered in this cause on the 18th day of September, 1892, at and for the sum of four hundred thousand dollars (\$400,000), by said purchasing committee bid, be, and the same is in all things ratified, approved, confirmed, and made absolute; subject, however, to all the receiver's debts, preferential claims, and equities reserved, and to all and singular the conditions of purchase as recited in said decree, and the continued right of this court to adjudge and declare what receiver's or corporate debts are prior in lien or in equity to the lien of the mortgage herein foreclosed, or ought to be paid out of such proceeds of sale in preference to the bonds issued under said mortgage, including the claims set up by the intervention of Carter & Rogan and others, or to the holders of certificates issued under the contract exhibited thereto, if hereafter so adjudged by the court. . . . It is further ordered, adjudged, and decreed that the special commissioner, Joseph W. Burke, be, and he is hereby, authorized and directed, on request of said purchasers, to sign, seal, execute, acknowledge, and deliver a proper deed or deeds of conveyance to the said purchasing committee, or their nominee, conveying all and singular the railway, equipment, property, and franchises of the said Chattanooga Southern Railway within the states of Tennessee, Georgia, Alabama, and all property, rights, and franchises that the said Joseph W. Burke, as receiver

⁴¹ Copied from *Central Trust Co. v. Carter*, 78 Fed. Rep. 225.

of said Chattanooga Southern Railway Company, has acquired during the time of his receivership, free from any equity of redemption of the said Chattanooga Southern Railway Company, or any party to this suit, or any one claiming by, under or through the said Chattanooga Southern Railway Company, or any party to this suit. The court reserves full power, notwithstanding such conveyance and delivery of possession, to retake and resell said property this day confirmed to said purchasers, if they fail or neglect fully to complete such purchase and comply with the orders of this court in respect to full payment and performance of their said bid, or to pay into court, in accordance with such decree of sale, all such sums of money hereafter ordered by this court to be paid into its registry to discharge any and all such debts, liens, or claims as the court may adjudge and decree ought to be paid out of the proceeds of sale in preference to the bonds secured by the mortgage of the Chattanooga Southern Railway Company herein foreclosed.

In open court this 16th March, 1895.

[Judge's Signature.]

FORM NO. 39.*

ANOTHER DECREE CONFIRMING FORECLOSURE SALE.

[Title of court and cause, etc., see Form No. 30, *supra*, p. 1805.]

DECREE CONFIRMING SALE.

And now, on this 4th day of April, 1881, the report of Mathew F. Pleasants, the master heretofore appointed by this court to make sale of the mortgaged premises, having been heretofore duly made and filed, a copy of which report is as follows, to wit, (setting out report); and it appearing to this court, and the court finds the facts so to be, that the thirty days notice to the purchaser and the defendant's solicitors, as required by said decree herein, of the presentation of said report for confirmation of said sale to be made at this time and place, has been duly given; and thereupon said report of sale being now presented to this court by the complainants' solicitors, and motion made by them that the same be confirmed, and the same having been duly considered,—it is hereby ordered that the report of said master of said sale, and said sale, be, and the same are, in all respects confirmed. Thereupon the complainants' solicitors submitted to this court forthwith a draft deed of conveyance from the said master to the purchaser, as provided by the decree herein, which draft deed of conveyance is in the words and figures following, to wit: (Here was set out in full the deed conveying to purchaser a railroad sold under foreclosure).

And, the said deed of conveyance having been duly considered by this court, the same is now, and hereby, settled and approved. It is hereby further ordered, adjudged and decreed that the said master, Mathew F. Pleasants, when and so soon as the balance of said purchase money mentioned in said report of sale shall have been paid as hereinafter provided, shall make, execute and deliver a deed of conveyance in the form aforesaid to the Norfolk and Western Railroad Company, being the name of the corporation designated as purchaser by said Clark, to whom

* Copied from *Duncan v. Atlantic etc. R. Co.* 88 Fed. Rep. 843.

said property was sold, as set forth in said draft deed of conveyance. And it is further ordered that the purchaser, on or before the 3d day of May, 1881, pay the balance of said purchase money over and above the one hundred thousand dollars paid at the time said property was bid off at said sale, as follows, to wit: Five million of dollars thereof into the Union Trust Company, of the city of New York, subject to the order of this court in this cause; and three million two hundred dollars thereof into the Fidelity Insurance, Trust and Safe-Deposit Company of Philadelphia, subject to the order of this court in this cause; and the remainder of said purchase money (except the one hundred thousand dollars now deposited in the Planters' National Bank of Richmond), amounting to three hundred and five thousand dollars, shall be paid by the purchaser into the National Exchange Bank of Norfolk, Virginia, subject to the order of this cause; and the said purchaser shall take duplicate certificates of deposit of said trust companies and of said National Exchange Bank of Norfolk, and deliver the same to the said master, who shall safely keep one set, and deliver the same into this court, and the other set said master shall deliver to the complainants' solicitors. And it is further ordered that upon the delivery as aforesaid of said duplicate certificates to the said master for the whole amount of said purchase money, to wit, for the sum of eight million six hundred and five thousand dollars, less one hundred thousand dollars now deposited in the Planters' National Bank of Richmond, the said master forthwith execute and deliver said deed to the purchaser; and thereupon the possession of the premises and property set out in said decree and report of sale shall vest in the Norfolk and Western Railroad Company, the grantees named by said Clarence H. Clark, who was the highest bidder at said sale, as the corporation to which said conveyance should be made; and the receivers shall thereupon hand over and deliver the said premises and property to the said Norfolk and Western Railroad Company.

HUGH L. BOND, Circuit Judge.

RO. W. HUGHES, District Judge.

Richmond, April 4, 1881.

FORM NO. 40.⁴⁴

DECREE DISTRIBUTING BALANCE AFTER FORECLOSURE SALE.

[Title of court and cause, etc., see Form No. 30, *supra*, p. 1805.]

Decree distributing balance in court after satisfaction of the mortgage debt.

And now, March 18, 1882, this cause came on to be heard on motion for transfer of balance of funds in hands of the receivers February 10, 1881, and the distribution of balance of proceeds of sale of the mortgaged premises; and it appearing by the report of Charles L. Perkins, special master, that the remaining bonds mentioned in the report of M. F. Pleasants and Charles L. Perkins, special mas-

⁴⁴ Copied from *Duncan v. Atlantic etc. R. Co.*, 88 Fed. Rep. 852. As to form of decrees, see *Equity Rule 86, supra*, p. 1692.

ters, filed May 3, 1881, to wit, \$273,550, with interest thereon at the rate of three per cent. from the 3d day of May, 1881, to wit, \$4,445.19, have been paid out of the purchase money heretofore paid into court by the purchaser, under the direction of said Charles L. Perkins, special master, except one bond and certain coupons which are still outstanding; and it also appearing that the purchase of the claim of the state of Virginia secured by the mortgage dated December 22, 1870, by the Norfolk and Western Railroad Company, has been ratified by the general assembly of the said commonwealth; and the Norfolk and Western Railroad Company, claimant of the said funds in the hands of the receivers as purchaser under the terms of the decree and deed of conveyance, and whose right thereto was reserved by the terms of the decree of May 3, 1881, and also as assignee of the claim of the state of Virginia of its claim secured by the mortgage of December 22, 1870, consenting to this decree; and it further appearing that many of the owners of the claims for labor and supplies are resident upon the line of the said Norfolk and Western Railroad, and that said company is the owner by assignment of a majority of the said claims, and is entitled, either as purchaser of mortgaged premises at the sale of February 10, 1881, or as assignee of the claim of the state of Virginia, to the surplus, if any, of the proceeds of sale, and of the net earnings in the hands of the receivers: It is therefore ordered, adjudged and decreed that the balance of the said proceeds of sale, and the funds in the hands of the receivers, including the special deposit of forty-five thousand dollars in the Exchange National Bank of Norfolk, together with all the accretions of interest, be paid over to said Norfolk and Western Railroad Company, upon the special trust, however, that out of the said funds the said Norfolk and Western Railroad Company shall and will pay the principal of mortgage bond No. 2,652, and all outstanding coupons mentioned in the report of Charles L. Perkins and M. F. Pleasants, as special masters, of May 3, 1881, with interest to May 3, 1881, upon presentation, and shall and will also pay to the lawful owners and holders of claims for labor and supplies the principal of said claims, with interest to the 6th day of June, 1876, in full settlement and discharge thereof; and John S. Wise is hereby appointed special master commissioner to superintend the payment of said claims, and his certificate of approval shall be a sufficient warrant for such payment; but in case of dispute as to the validity of a claim which shall be presented, or as to the title of the holder, the same may be brought to the attention of the court summarily by motion, jurisdiction of the cause being hereby specially retained for that purpose, and the surplus, if any, shall be taken and received by the Norfolk and Western Railroad Company on account of its claims as assignee of the commonwealth of Virginia, or of labor and supply claims, or as purchasers. And it is further ordered that the clerk of this court do check upon the Exchange National Bank of Norfolk, in favor of the Norfolk and Western Railroad Company for the sum of two hundred and forty-five thousand two hundred and six 44-100 dollars, upon the Union Trust Company for the sum of twenty-nine thousand nine hundred and twenty-four 37-100 dollars; and that the receivers do pay over to the Norfolk and Western Railroad Company the balance of the funds in their hands after the deduction of the allowance this day made.

HUGH L. BOND, Circuit Judge.
RO. W. HUGHES, District Judge.

Norfolk, March 18, 1882.

FORM NO. 41.^a

CONSENT DECREE.

In the Supreme Court of the District of Columbia.

Thomas J. Phelps, Assignee,	} In Equity, No. 3,910.
vs.	
Augustine R. McDonald and William White.	

This cause came on to be further heard on this 16th day of February, A. D. 1875; and thereupon, and upon consideration thereof, and with the consent of the parties to this suit, and of Charles E. Hovey and William P. Dole, parties complainant in a certain cause in equity in this court, numbered 3,937, against the same defendants, and claiming one-fourth of the award in the proceedings mentioned,

It is, this 16th day of February, A. D. 1875, ordered, adjudged, and decreed—

1. That the restraining orders heretofore made in both said causes are hereby vacated.

2. That the decree made in this cause on the 28th day of December, A. D. 1874, appointing George W. Riggs, Esq., receiver, and granting a provisional injunction, is modified as follows, viz.: That the defendant William White may receive from the agents of the British government the one-half of the net amount of the award in the proceedings mentioned, free and discharged of all claims of the plaintiffs in both the causes above mentioned, to enable the said defendant to pay the expenses incurred by the defendant A. R. McDonald in the prosecution of this claim; which sum of one-half of said award the court finds to be the reasonable expense incident to the prosecution of the said claim by said defendant A. R. McDonald before said mixed commission, exclusive of said claim of Hovey and Dole.

3. That the remaining half the net amount of said award shall be paid to the said George W. Riggs; and it is ordered, adjudged and decreed that the defendants shall execute all such orders, receipts and acquittances necessary to enable the said George W. Riggs to collect the same. And the said George W. Riggs shall hold the said half of the said award subject to the claims, liens, and rights of the said Charles E. Hovey and William P. Dole, and of the plaintiff in this cause, to be determined by the further decree of this court in this cause and in the cause of said Hovey and Dole hereinbefore mentioned. It is further ordered that said receiver be directed to invest the money so placed in his hands in bonds of the United States or in 3 65-100 bonds of the District of Columbia guaranteed by the United States, as he may deem best for the interest of the parties concerned, and that a copy of this decree be filed in the last mentioned cause.

[Signature of Judge.]

^a This form is copied from *Hovey v. McDonald*, 109 U. S. 152.

FORM NO. 42.*

DECREE FOR INJUNCTION AND ACCOUNTING IN PATENT CASE.

At a term of the Circuit Court of the United States for the Northern District of New York, held at the court-house in the village of Canandaigua, on the 28th day of June, 1853.

Present: The Honorable Samuel Nelson, Nathan K. Hall, Judges.

The Troy Iron and Nail Factory	} In Equity.
v.	
Erastus Corning, James Horner and John H. Winslow.	

The above named, the Troy Iron and Nail Factory, the complainants in the above entitled suit, having duly appealed to the Supreme Court of the United States from that part of the decree made in this suit, which dismissed the bill of complaint herein with cost to be taxed, and the said Supreme Court of the United States having duly heard the said appeal at the December term, 1852, upon the transcript of the record, and having reversed the said decree of the Circuit Court of the United States for the Northern District of New York, with costs, and having ordered, adjudged, and decreed that the said complainants recover against the said defendants three hundred and sixty dollars and forty-two cents for their costs in said Supreme Court and that they have execution therefor: The said Supreme Court having remanded the said cause to the said Circuit Court with instructions to enjoin the defendants perpetually from using the improved machinery with the bending lever for making hook or brad-headed spikes, patented to Henry Burden the 2d September, 1840, and assigned or transferred to the complainants, as set forth in complainants' bill, and to enter a decree in favor of the complainants for the use and profits thereof, upon an account to be stated by a master under the direction of the said Circuit Court, as is prayed for by the said complainants in their bill of complaint, and for such further proceedings to be had thereon, in conformity to the opinion and decree of the said Supreme Court, as to law and justice may appertain, which order, decree, and instructions appear to this court by the mandate of the said Supreme Court:

Now, therefore, on filing the said mandate, and in pursuance thereof, and after hearing Mr. Stevens, for the said complainants, and Messrs. Seymour and Seward, for the defendants, it is ordered, adjudged, and decreed, and this court, by virtue of the power and authority therein vested, and in obedience to the said mandate, doth order, adjudge, and decree, that the instrument in writing, bearing date the 14th day of October, 1845, stated and set forth in the pleadings in this cause executed by the said Henry Burden and the said defendants, did not, in legal effect or otherwise, or by just construction, license, impart, authorize, or convey a right to the said defendants to use the said improvements in the manufacture of the hook-headed spikes, by the machinery mentioned in the said bill of com-

* This form is copied from *Corning v. Troy Iron and Nail Factory*, 15 How. (U. S.) 455.

plaint, or any rights secured to the said Henry Burden by the said letters-patent, and assigned or transferred to the said complainants, as aforesaid.

And it is further adjudged and decreed, that the said defendants have infringed and violated the said patent, so granted to the said Henry Burden, as aforesaid, by making and vending the said hook-headed spikes by the said machinery patented to the said Burden on 2d September, as aforesaid.

And it is further adjudged and decreed, that the said defendants do account to the said complainants for the damages or use and profits, in consequence of the said infringements by the said defendants.

And it is further adjudged and decreed, that an account of the damages, or use and profits, be taken and stated by Marcus T. Reynolds, Esq., counsellor at law, as master of this court, *pro hac vice*, and that the defendants attend before the said master, from time to time, under the direction of the said master, and that the said complainants may examine the said defendants under oath as to the several matters pending on the said reference, and that the said defendants produce before the said master, upon oath, all such deeds, books, papers, and writings, as the said master shall direct, in their custody or under their control, relating to said matters, which shall be pending before said master.

And it is further ordered and decreed, that a perpetual injunction issue out of and under the seal of this court, against the said defendants, commanding them, their attorneys, agents, and workmen to desist and refrain from making, using, or vending any machine containing the new and useful improvement for which letters-patent were granted to the said Henry Burden on the second day of September, 1840, and from in any manner infringing or violating any of the rights or privileges granted or secured by said patent.

And it is further ordered, that the said complainants recover of the said defendants the damages or use and profits which shall be reported by the said master, and that upon the confirmation of his report [a] decree be entered against the defendants therefor, and also for the costs of the complainants in this suit in this court, and that the said complainants have execution therefor and for the costs in the said Supreme Court.

And it is further ordered and decreed, that such other proceedings be had herein, in conformity to the opinion of the said Supreme Court, as to law and justice may appertain, and that the parties and master may apply, upon due notice, to this court, upon the foot of this decree, for such other and further orders, instructions, and directions, as may be necessary.

A. A. BOYCE,
Clerk.

FORM NO. 42.*

DECREE FOR PERMANENT INJUNCTION IN COPYRIGHT CASE.

At a Stated Term of the Circuit Court of the United States for the Southern District of New York, held at the United States Circuit Court Room, in the

* Copied from the record in *Black v. Henry G. Allen Co.*, 42 Fed. Rep. 618. For other pleadings and proceedings in the same case, see Forms Nos. 3, 12, *supra*, pp. 1773, 1787, and Form No. 45, *infra*, p. 1821.

Post-office Building in the city of New York, in said District, on the sixteenth day of May, 1893.

Present: Hon. William K. Townsend, Judge.	} In Equity, No. 4,718.
James T. Black, Francis Black, Adam W. Black and	
Francis A. Walker, Complainants,	
v.	
The Henry G. Allen Company, Defendant.	

This cause came on to be heard at this term, and was argued by counsel; and thereupon, upon consideration thereof, it was ordered, adjudged and decreed as follows:

I. That the certain copyright having relation to and being for a certain book entitled "United States, Part III, Political Geography and Statistics," and granted to Francis A. Walker on the thirteenth day of February, 1888, and in the bill of complaint herein mentioned, is a lawful copyright secured and existing under and in pursuance of the statutes of the United States, and good and valid in law, whereby there was secured to and acquired by the said Francis A. Walker, his heirs and assigns, the sole liberty of printing, reprinting, publishing, completing, copying, executing, finishing and vending the said book for the term of twenty-eight years from the time of recording the title thereof, to wit, from the said thirteenth day of February, 1888.

II. That the defendant herein has infringed the said copyright and the rights of the complainants thereunder by reproducing, copying, publishing and selling, and causing to be reproduced, copied, published and sold, without the complainants' consent, copies of said copyrighted book entitled "United States, Part III, Political Geography and Statistics," as part of the twenty-third volume of a certain reprint of a certain book or publication entitled "Encyclopaedia Britannica, Ninth Edition."

III. That an injunction issue herein, perpetually enjoining and restraining defendant herein, The Henry G. Allen Company, its officers, agents, servants and workmen, from in any form or manner, directly or indirectly, reproducing, and from printing and from reprinting and from copying and from in any form or manner, directly or indirectly, offering to reproduce, and from offering to print and from offering to reprint and from offering to copy and from in any manner whatsoever offering to sell any copy or copies whatsoever of said copyrighted book entitled "United States, Part III, Political Geography and Statistics," or any part or parts thereof; and from directly or indirectly, in any form or manner, reproducing, printing, reprinting, completing, copying, executing, finishing, vending, or selling, and from directly or indirectly, in any form or manner, offering to reproduce, print, reprint, complete, copy, execute, finish, vend or sell any copy or copies whatsoever of the book or publication entitled "Encyclopaedia Britannica, Ninth Edition," or any other book or publication which shall contain or consist in part of said copyrighted book entitled "United States, Part III, Political Geography and Statistics." But nothing herein contained shall in any wise prohibit the sale by the said defendant of any book whatsoever published or issued by the owners of said copyright or their representatives.

IV. That the complainants do recover of the defendant the costs and disbursements of this suit.

WM. K. TOWNSEND,
Judge.

FORM NO. 44.*

DECREE FOR PERMANENT INJUNCTION AGAINST INTERFERENCE
WITH INTERSTATE COMMERCE.

[Title of court and cause, etc., see Form No. 43, *supra*, p. 1818.]

Upon reading the verified bill of complaint in this cause, and hearing Thomas E. Milchrist, district attorney for the United States, thereon, it is ordered, adjudged and decreed that (Here many individual defendants were named) and all persons combining and conspiring with them, and all other persons whomsoever, absolutely to desist and refrain from in any way or manner interfering with, hindering, obstructing or stopping any of the business of any of the following named railroads (specifically naming the various roads named in the bill,) as common carriers of passengers and freight between or among any States of the United States, and from in any way or manner interfering with, hindering, obstructing or stopping any mail trains, express trains, or other trains, whether freight or passenger, engaged in interstate commerce, or carrying passengers or freight between or among the states; and from in any manner interfering with, hindering or stopping any trains carrying the mail; and from in any manner interfering with, hindering, obstructing or stopping any engines, cars, or rolling stock of any of said companies engaged in interstate commerce, or in connection with the carriage of passengers or freight between or among the states; and from in any manner interfering with, injuring or destroying any of the property of any of the said railroads engaged in or for the purpose of, or in connection with, interstate commerce or the carriage of the mails of the United States or the transportation of passengers or freight between or among the states; and from entering upon the grounds or premises of any of said railroads for the purpose of interfering with, hindering, obstructing or stopping any of said mail trains, passenger or freight trains engaged in interstate commerce, or in the transportation of passengers or freight between or among the states, or for the purpose of interfering with, injuring, or destroying any of said property so engaged in or used in connection with interstate commerce or the transportation of passengers or property between or among the states; and from injuring or destroying any part of the tracks, roadbed or road, or permanent structures of said railroads; and from injuring, destroying, or in any way interfering with any of the signals or switches of any said railroads; and from displacing or extinguishing any of the signals of any of said railroads, and from spiking, locking, or in any manner fastening any of the switches of any of said railroads, and from uncoupling or in any way hampering or obstructing the control by any of said railroads of any of the cars, engines, or parts of trains of any of said railroads engaged in interstate commerce or in the transportation of passengers or freight between or among the states, or engaged in carrying any of the mails of the United States; and from compelling or inducing or attempting to compel or induce, by threats, intimidation, persuasion, force, or violence, any of the employees of any of said railroads to refuse or fail to perform any of their duties as employees of any of said railroads in connection with the interstate business or commerce of such railroads or the carriage of the United States mail by such railroads, or the transportation of passengers or property between or among

* Copied from *In re Debs*, 158 U. S. 570.

the states; and from compelling or inducing or attempting to compel or induce by threats, intimidation, force, or violence any of the employees of any of said railroads who are employed by such railroads and engaged in its service in the conduct of interstate business, or in the operation of any of its trains carrying the mail of the United States, or doing interstate business, or the transportation of passengers and freight between and among the states, to leave the service of such railroads; and from preventing any person whatever, by threats, intimidation, force or violence from entering the service of any of said railroads and doing the work thereof in the carrying of the mails of the United States, or the transportation of passengers and freight between or among the states; and from doing any act whatever in furtherance of any conspiracy or combination to restrain either of said railroad companies or receivers in the free and unhindered control and handling of interstate commerce over the lines of said railroads, and of transportation of persons and freight between and among the states; and from ordering, directing, aiding, assisting, or abetting in any manner whatever, any person or persons to commit any or either of the acts aforesaid.

And it is further ordered that the aforesaid injunction and writ of injunction shall be in force and binding upon such of said defendants as are named in said bill from and after the service upon them severally of said writ by delivering to them severally a copy of said writ or by reading the same to them and the service upon them respectively of the writ of subpoena herein, and shall be binding upon said defendants, whose names are alleged to be unknown, from and after the service of such writ upon them respectively by the reading of the same to them or by the publication thereof by posting or printing, and after service of subpoena upon any of said defendants named herein shall be binding upon said defendants and upon all other persons whatsoever who are not named herein from and after the time when they shall severally have knowledge of the entry of such order and the existence of said injunction.

[Signature of Judge.]

FORM NO. 45.*

WRIT OF INJUNCTION IN COPYRIGHT CASE.

The President of the United States of America to The Henry G. Allen Company,
your officers, agents, servants and workmen, Greeting:

Whereas, it has been represented to us in our Circuit Court of the United States for the Southern District of New York, in the Second Circuit, on the part of James T. Black, Francis Black, Adam W. Black and Francis A. Walker, complainants, that they have lately exhibited their bill of complaint in our said Circuit Court of the United States for the Southern District of New York, against you, the said The Henry G. Allen Company, defendant, to be relieved touching the matters therein complained of; and that the certain copyright having relation

* Copied from the record in *Black v. Henry G. Allen Co.*, 42 Fed. Rep. 618. For bill and decree in this case see Forms Nos. 3, 43, *supra*, pp. 1773, 1818.

to and being for a certain book entitled "United States, Part III, Political Geography and Statistics," and granted to Francis A. Walker, on the thirteenth day of February, 1888, and in the bill of complaint herein mentioned, is a lawful copyright secured and existing and in pursuance of the statutes of the United States, and good and valid in law, whereby there was secured to and acquired by the said Francis A. Walker, his heirs and assigns, the sole liberty of printing, reprinting, publishing, completing, copying, executing, finishing and vending the said book for the term of twenty-eight years from the time of recording the title thereof, to wit, from the said thirteenth day of February, 1888; and that you, the said The Henry G. Allen Company, defendant herein, have infringed the said copyright and the rights of the complainants thereunder, by reproducing, copying, publishing and selling, and causing to be reproduced, copied, published and sold, without the complainants' consent, copies of said copyrighted book entitled "United States, Part III, Political Geography and Statistics," as part of the twenty-third volume of a certain book or publication entitled "Encyclopaedia Britannica, Ninth Edition."

Now, therefore, we do strictly command and perpetually enjoin you, the said The Henry G. Allen Company, your officers, agents, servants and workmen, under the pains and penalties which may fall upon you and each of you in case of disobedience, that you forthwith and forever hereafter, desist and refrain from in any form or manner, directly or indirectly, offering to reproduce, and from offering to reprint, and from offering to copy and from in any manner whatsoever offering to sell any copy or copies whatsoever of the said copyrighted book entitled "United States, Part III, Political Geography and Statistics," or any part or parts thereof; and from directly or indirectly, in any form or manner, reproducing, printing, reprinting, copying, executing, finishing, vending or selling, and from directly or indirectly, in any form or manner, offering to reproduce, print, reprint, complete, copy, execute, finish, vend or sell, any copies whatsoever of the book or publication entitled "Encyclopaedia Britannica, Ninth Edition," or any other book or publication which shall contain or consist in part of said copyrighted book entitled "United States, Part III, Political Geography and Statistics." But nothing herein contained shall in anywise prohibit the sale by you, the said The Henry G. Allen Company, of any book whatsoever published or issued by the owners of said copyright, or their representatives.

Witness, the Honorable Melville W. Fuller, Chief Justice of the United States of America, at the city of New York, in said Southern District of New York, this nineteenth day of May, in the year of our Lord one thousand eight hundred and ninety-three.

(Seal)

ROWLAND COX,

Complainants' Solicitor.

JOHN A. SHIELDS,

Clerk.

FORM NO. 46.*

WRIT OF ASSISTANCE.

In the Circuit Court of the United States for the District of Nebraska.

<p>Ætna Life Insurance Company of Hartford, Connecticut, Complainant, against Solomon C. Maple et al., Defendants.</p>	}	In Chancery.
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The President of the United States to George H. Thummel, Marshal of the District of Nebraska, Greeting:

Whereas in the above entitled cause it has been made to appear in the United States Circuit Court in and for the district of Nebraska, that after the decree of said court heretofore rendered in the above cause and proceedings taken for the enforcement thereof, the said Ætna Life Insurance Company as complainant and purchaser at the foreclosure sale under said decree is entitled to be put in possession of the following described realty, to wit: (describing realty).

Now, therefore, you, as United States Marshal, for said district of Nebraska, are hereby directed and commanded that you forthwith put the said Ætna Life Insurance Company into possession of the real estate above described and that you cause the defendants in the above entitled cause, their agents, servants and attorneys, forthwith to yield possession of said property in obedience to the decree entered in this cause. Fail not hereof.

Witness, the Hon. M. W. Fuller, Chief Justice of the Supreme Court of the United States, this fourth day of March, 1898, with the seal of the United States Circuit Court in and for the district of Nebraska.

(Seal)

OSCAR B. HILLIS,
 Clerk.

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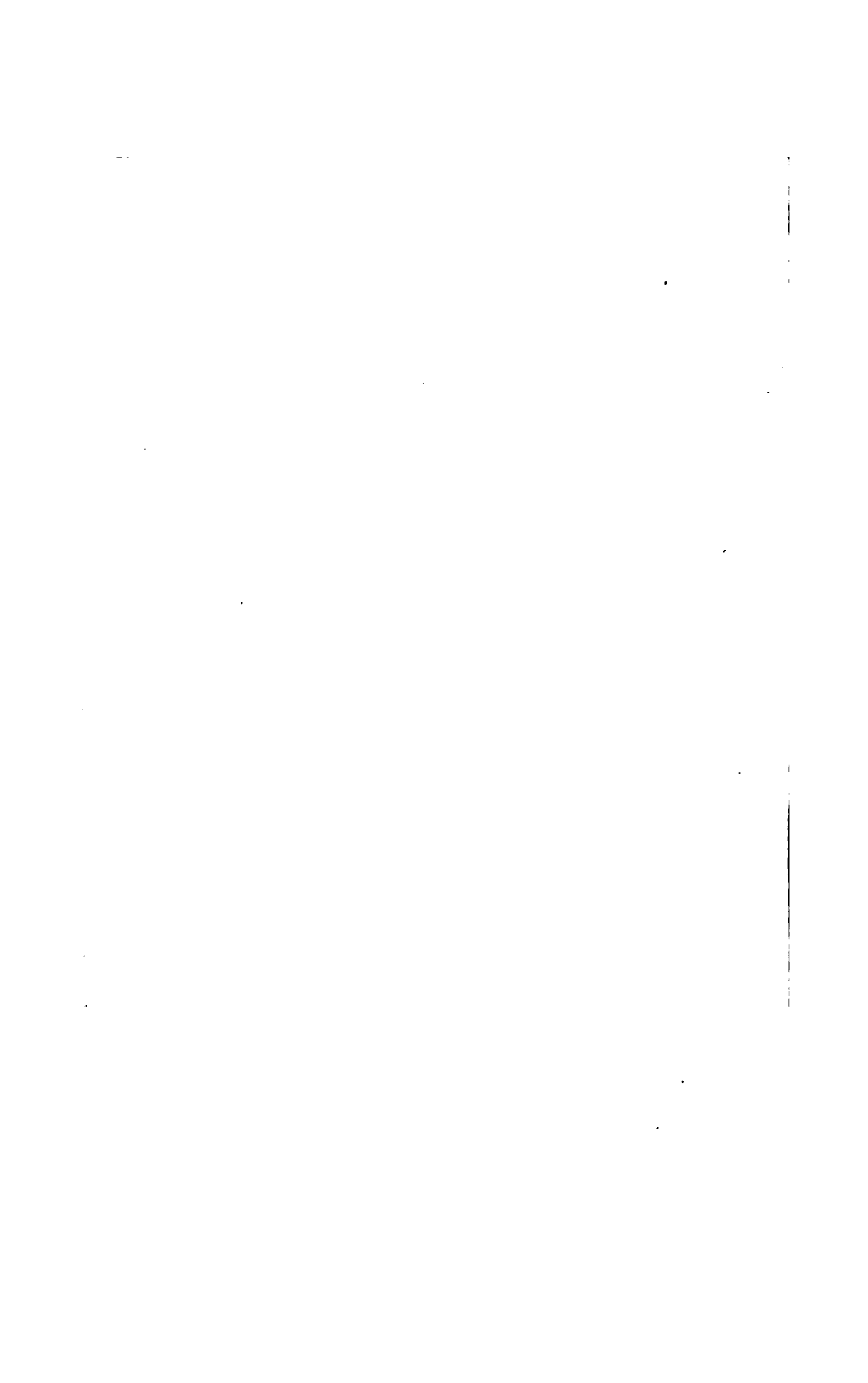
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